

COPYRIGHT ROYALTY TRIBUNAL

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:
PUBLIC BROADCASTING RATE PROCEEDINGS :
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1111 20th Street, N.W.
Room 450
Washington, D. C.

Wednesday, May 31, 1978

The hearing in the above-entitled matter commenced
at 10:00 a.m.

BEFORE:

COMMISSIONER THOMAS C. BRENNAN, Chairman
COMMISSIONER DOUGLAS E. COULTER
COMMISSIONER MARY LOU BURG
COMMISSIONER CLARENCE L. JAMES, JR.
COMMISSIONER FRANCES GARCIA

ORIGINAL

APPEARANCES:

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I. FRED KOENIGSBERG, Attorney-at-Law
BENJAMIN ZELENKO, Attorney
Counsels for ASCAP

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Counsel for PBS

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P R O C E E D I N G S

1
2 CHAIRMAN BRENNAN: This meeting will come to order.
3 The notice of this meeting appeared in the Federal Register
4 on Monday, May 22. I direct that the notice be inserted
5 at this point in the record.

6 The first item on the agenda is the proposed
7 rule for filing of claims to cable royalty fees. The
8 proposed rule was published in the Federal Register on
9 May 5. The publication of the proposed rule was preceded
10 by an advance notice of proposed rulemaking. Many of the
11 suggestions which were received pursuant to the advanced
12 notice of rulemaking were incorporated in the proposed
13 rule. Consequently, only two amendments have been suggested
14 to the proposed rule.

15 These amendments have been submitted on behalf
16 of the National Basketball Association and the National
17 Hockey League. The first amendment would add an additional
18 requirement to the content of claims to be filed during the
19 month of July 1978.

20 The additional requirement would be the identifi-
21 cation of at least one secondary transmission which would
22 establish a basis for the claim. The rationale for the
23 proposed amendment is that in the absence of that requirement,
24 a person who had no right to share in the cable royalties
25 could take part in the distribution proceedings.

1 The second proposed amendment deals with the
2 subject of joint claims. This amendment would require that
3 any joint claim that is submitted must include a statement
4 of the authorization for the submission of the joint claim.

5 The purpose of the amendment is to avoid unjusti-
6 fied joint claims. Speaking as an individual Commissioner,
7 I have no objections to the proposed amendments. Are
8 there any comments by Commissioners?

9 (No verbal response.)

10 CHAIRMAN BRENNAN: If not, I move that the
11 proposed rule be amended in the following manner. That
12 part 302.2 be amended to add the following final sentence.
13 "A joint claim shall include a concise statement of the
14 authorization for the filing of the joint claim". And that
15 part 302.3 be amended to add a new subsection D, which would
16 read, "Identification of at least one secondary transmission
17 establishing a basis for the claim".

18 Is there any debate on the proposed amendments?

19 (No verbal response.)

20 CHAIRMAN BRENNAN: If not, all those in favor of
21 the amendment, please indicate.

22 (Commissioners nodded in agreement.)

23 CHAIRMAN BRENNAN: Opposed?

24 (No comment.)

25 CHAIRMAN BRENNAN: The amendments are adopted.

1 The question that occurs now on the proposed
2 rule as amended. Is there any discussion of the proposed
3 rule as amended?

4 (No verbal comment.)

5 CHAIRMAN BRENNAN: If not, do I hear a motion?

6 Commissioner Coulter has moved that the proposed
7 rule as amended be adopted. The draft rules of this agency
8 specify that votes of Commissioners shall be separately
9 recorded. It would seem appropriate that we follow that
10 practice on a vote on the final adoption of a rule.

11 Therefore, on this recorded vote, a yea vote
12 is a vote to adopt the proposed rule as amended. A nay
13 vote would be a vote disapproved the proposed rule as
14 amended. We shall now proceed to record a vote.

15 Commissioner Coulter?

16 COMMISSIONER COULTER: Yes.

17 CHAIRMAN BRENNAN: Commissioner Burg?

18 COMMISSIONER BURG: Yes.

19 CHAIRMAN BRENNAN: Commissioner James?

20 COMMISSIONER JAMES: Yes.

21 CHAIRMAN BRENNAN: Commissioner Garcia?

22 COMMISSIONER GARCIA: Yes.

23 CHAIRMAN BRENNAN: The Chairman votes yea.

24 On this vote the yeas are five; the nays are none. The
25 proposed rule as amended is adopted.

1 For the benefit of those with interest in this
2 matter, I should state that the rule requires that
3 copyright owner and claimants file claims with us during
4 the month of July 1978 if they wish to share in the
5 cable royalties for secondary transmission during the first
6 six months of 1978.

7 The second item on the agenda is the continuation
8 of the consideration of the royalty rate terms by non-
9 commercial broadcasting. Lest this body be accused of
10 favoritism toward musical works, we shall begin this morning
11 with pictorial, graphic and sculptural works.

12 At the last meeting we reached a tentative
13 agreement not to accept the Public Broadcasting position
14 that payment and reports of uses for visual works should
15 be limited to the national programs of Public Broadcasting
16 service. And it might be well now to proceed to considera-
17 tions of some of the proposals concerning the terms of
18 use.

19 We had several suggestions by representatives
20 of copyright owners that would place restrictions on the
21 use of the visual works in programs of Public Broadcasting.
22 These dealt with such matters as so-called thematic use,
23 the moral rights of the author, protection against distortion
24 of a work; and the concerns addressed by the cartoonists
25 concerning a delay between the publication of a cartoon in

1 a newspaper and use of a cartoon on public broadcasting.
2 And then we have the problem raised by the request of
3 Public Broadcasting that we, in essence, define the scope
4 of fair use in terms of the time period that would be
5 established as to the payment, required payment of a
6 royalty fee.

7 We also have the issue of whether a single
8 fee will authorize unlimited broadcast use of the work, or
9 whether certain limitations should be placed upon the
10 frequency of use.

11 Although theoretically I'm not unsympathetic
12 to some of the concerns which have been advanced by
13 representatives of the visual artists, I must cite my
14 position on these issues on the basis of the record
15 established in this proceeding. No witnesses were presented
16 to discuss the practical necessity for most of these
17 restrictions. And therefore, my general position is not
18 to favor the adoption of the restriction which have been
19 advocated by the visual artists.

20 As to the duration question, I do not believe
21 it is the function of this body to define fair use, and
22 I would not favor Public Broadcasting's proposal in that
23 area. As to the frequency of use, I believe that unlimited
24 broadcast use for a period of three years is a reasonable
25 position.

1 We touched briefly on that point at the last
2 meeting. Commissioner James indicated at that time that
3 he thought that a separate fee should be imposed every time
4 there is a broadcast use. I would invite Commissioners now
5 to comment on any of these subjects.

6 Commissioner James, do you want to pursue the--

7 COMMISSIONER JAMES: No, I don't.

8 CHAIRMAN BRENNAN: Can the Chair state then that
9 the general consensus appears to have developed on these
10 issues.

11 We go on, then, to consider the question of
12 royalty fees for the use of visual works. All the parties
13 on this issue have emphasized to us the very limited
14 information which is currently available. And thus,
15 likely that our final opinion would indicate that we, at
16 least in this area, are not undertaking to establish a
17 precedent.

18 As to the amount of these fees, the reality is
19 that some visual artists will not receive compensation to
20 which they are justly entitled. But I do not believe that
21 we can establish a schedule of rates based on the
22 exceptional work art, and then we must attempt to establish
23 a range which is reasonably fair to the artists as well as
24 to Public Broadcasting.
25

1 figures to me for radio, which is the total public radio
2 audience, 103,632,823. Those are base figures to that,
3 and I have been told by A. C. Neilsen, I know it from my
4 own background, that any system that has roughly two-thirds
5 of its broadcast entities broadcasting or transmitting on
6 UHF simply does not have the reach of VHF.

7 That has to be weighted differently, qualified
8 differently, adjusted--if you will--differently than anything
9 else. Again, for purposes of my proposal, I will use
10 temporarily their figure of an adjusted UHF television
11 population of 172,396,000.

12 I am proposing that for radio we apply a figure
13 of one-fifth of a cent to the 103,632,823 figure, and we
14 come out with a payment of \$207,265.64. I am further
15 proposing that for television--again keep in mind these
16 base figures, I think they're subject to revision upward.

17 But for these purposes, the 172.4 million we
18 will apply one-half a cent rate to it, which would give us
19 a total dollar figure of \$862,000. Those two figures
20 added up would result in a payment to ASCAP for the first
21 year of \$1,069,265.64.

22 I believe, obviously, that these figures will
23 increase, though the rate--the fifth of a cent and the half
24 of a cent--will stay constant, the base figures have indeed
25 increased from the time really that I got these on my desk

1 contact with haven't gotten all the material into us,
2 and with good reason--they're on different computers, I
3 suppose, different print-outs. So, what I'm going to do this
4 morning is to use--if I may--the figures PBS submitted to me
5 as an example of how my formula will work.

6 These figures probably aren't--I don't know--
7 let me preface it by saying that I don't know if these were
8 1976 figures, 1975 figures. I suspect they are one or the
9 other year. A. C. Neilsen did give me a little different
10 figure in terms of the total population, total television
11 population of the United States of age two and up, and their
12 figure was 204 million, some odd thousand, 204,648,000, total
13 TV population of the United States, age two and up.

14 The PBS submission quoted that figure as
15 201.5 million. So, I suspect that we're just talking different
16 years here. However, for the sake of my particular proposal,
17 let me now take it down a step and say that obviously--and
18 I believe very strongly--that whatever the total television
19 population of this country is, you cannot equate it with the
20 total public broadcasting television population. And on
21 that right now, I'd have to rely on PBS. So, that's a
22 certifiable figure and can be gotten.

23 But, again, for purposes of this proposal, I
24 will accept temporarily their figure of 193.2 million over
25 the age of two--that's television. And they have submitted

1 reasonable notice of the use of their works under this
2 section and under which records of such use shall be kept
3 by Public Broadcasting entities. Consequently, I believe
4 that we do have clear authority to modify the regulation
5 as to use reports and notice at any time after proper
6 compliance with the APA. And I would recommend to my
7 colleagues that in our final regulation we include a
8 specific provision which would affirm our right to
9 periodically review and possibly modify the regulations as
10 they apply to notice and recordkeeping.

11 Does any Commissioner desire to speak on this
12 subject?

13 (No verbal comment.)

14 CHAIRMAN BRENNAN: If not, I take it we have a
15 consensus. We'll turn now to the matter of the ASCAP/PBS
16 formula. At the May 4th meeting we authorized all interested
17 parties to comment on the market population proposal
18 advanced by Commissioner Burg. I will direct that the
19 letters which came in response to that request be made part
20 of the record of this proceeding.

21 Commissioner Burg.

22 COMMISSIONER BURG: Thank you, Mr. Chairman.
23 What I am going to lay on the table this morning is the
24 mechanism really more than the absolute figures. Unfortunately,
25 A. C. Nielsen and some of the other people we've been in

1 I have reviewed, not only the statute, but also
2 the entire legislative history of which the two committees
3 report are most important. The language in the statute
4 seems to be clear that copyright owners have a right to
5 be compensated for all uses of their work and a right of
6 notice concerning all such uses.

7 I reviewed the commentary in the two committee
8 reports and find nothing in that commentary to suggest
9 that it was the intent of the Congress to restrict payment
10 and reporting to national programs. Consequently, although
11 with some reluctance, I shall support a requirement that
12 there be payment and use reports for both national and
13 local recording.

14 I do this with reluctance because I'm not fully
15 persuaded of the practical value of certain of these
16 requirements. But my reluctance is, to some extent,
17 modified by my understanding of the copyright statute.
18 Although Section 118, subsection b precludes this body from
19 further consideration of the schedule of royalty rates
20 from its effective date until 1982, I find no similar
21 restriction with regard to the regulations which this body
22 will adopt concerning use reports.

23 The relevant language appears in Section 118b3,
24 and it reads: "The Copyright Royalty Tribunal shall also
25 establish requirements by which copyright owners may receive

1 Does any Commissioner at this stage wish to
2 discuss the rate schedule?

3 (No verbal comment.)

4 CHAIRMAN BRENNAN: If not, we can go on to
5 discuss recording rights, rates and terms. At the last
6 meeting we reached a tentative agreement that the rates
7 and terms of the Harry Fox/PBS agreement were generally
8 satisfactory to the extent that they involve matters
9 coming within the jurisdiction of this body.

10 The next question to be resolved is whether a
11 fee and also reporting requirements will be established
12 for uses by local stations and regional networks. As
13 Commissioners are aware, the Harry Fox/PBS agreement provides
14 for a royalty schedule based on uses by the National
15 Program of Public Broadcasting and NPR.

16 The music publishers and other copyright owners
17 have indicated during these proceedings that as a matter of
18 private contract they were willing to forego the requirement
19 of payment for uses by local stations and the requirement
20 of recording for such uses. But they argue to us that the
21 Copyright Statute requires that copyright owners be
22 compensated for all uses, and that there be a reasonable
23 prospect of copyright owners being informed of the use of
24 their work.

25

1 and checked with the subsequent year.

2 Secondly, if it is desired by either the other
3 Commissioners or by PBS or by ASCAP, that total dollar figure
4 can be applied. In other words, the total radio figure
5 and the total television figure can be applied to all the
6 entities within the system, so that each individual station
7 could have a prorated share of that figure.

8 So, it has a built-in growth factor; it has a
9 total figure which can be prorated. The base figures are
10 ascertainable and certifiable, in my belief at any rate.
11 And if you further reduce or prorate the overall figure
12 of revenue bases to the separate individual entities down
13 the line, you'd probably have an automatic inflationary
14 factor built into it also.

15 That is, in substance, my proposal. I suspect
16 that what really would have to be done--and A. C. Neilsen
17 was reluctant to give us all of that information I asked
18 for. We also talked to Arbitron. I don't know if it's
19 privileged information, it may well be, between them and
20 PBS. However, I firmly believe that the total television--
21 total public television population is there for the asking;
22 you can find it. We can get that base. I believe it to
23 be somewhat higher than the 193.2 million, just because the
24 overall figure is larger in the last year. And because I
25 feel strongly about the UHF factor, I believe some kind of

1 weighting or qualification should be included in that to
2 make parity, or to give some kind of parity to this particu-
3 lar procedure. But at any rate, Mr. Chairman, that is the
4 substance of my proposal, although the dollar figures would
5 be somewhat different.

6 CHAIRMAN BRENNAN: Thank you. Commissioner
7 Garcia?

8 COMMISSIONER GARCIA: Mr. Chairman, as part of
9 my independent research I met with Eric Smith and Carol McCabe
10 from PBS and CPB and three accountants, two from CPB and
11 one from PBS to obtain additional information about the
12 financial reporting of the PBS members, NPR members,
13 PBS, NPR and CPB. So that there will be no doubt about
14 ex-parte communication, I would like the record to show that
15 Mr. Korman, General Counsel of ASCAP was notified of my
16 visit and invited to have representation present. He
17 declined the offer.

18 After my visit with the above parties and my
19 review, I have concluded that there will be no extra burden
20 placed on public broadcasting using the revenue method. It
21 is my opinion that the revenue method is the most equitable
22 to determine the copyright royalty liability of public
23 broadcasting for the ASCAP repertoire. It is easy and
24 simple to administer for both users and licensors, best
25 represents the value of music and is most responsive to

1 changing economic conditions.

2 In the commercial broadcasting industry, the
3 copyright royalty fee has been a negotiated percentage which
4 is applied against gross income after some deductions.
5 ASCAP's method at arriving at a percentage rate for Public
6 Broadcasting is, by taking the gross income received by the
7 commercial broadcasting industry for television and radio and
8 dividing it into the income ASCAP has received from commercial
9 and radio television. Their proposed rates are .83 percent
10 television and 1.21 for radio.

11 The essence of ASCAP's argument is that the only
12 logical bench mark to come up with a rate for Public
13 Broadcasting is to compute it to what commercial broadcasters
14 have been paying for the ASCAP repertoire. In the commercial
15 broadcasting industry, the value of music has been related
16 to the revenues the music helps pull in. This is a fair
17 and equitable procedure. In my opinion, Public Broadcasting
18 has some unique characteristics due to their funding,
19 nature, scope of programs; and therefore, cannot validly
20 be totally compared to a commercial broadcasting setting.

21 The rates applicable to television and radio
22 should be less than the percentage rate requested by ASCAP.
23 In further support that a lower percentage than what ASCAP
24 is seeking is most applicable in these circumstances, I
25 refer to testimony by both Mr. Korman and Dr. Fagan, whereby

1 they acknowledge the uniqueness of Public Broadcasting and to
2 the same extent the established industry practice by other
3 parties dealing with public broadcasting whereby discounts
4 are granted. And they themselves have considered and offered
5 a 50% discount to public broadcasting.

6 Also, upon thorough questioning by Commissioner
7 Burg, of Dr. Fagan, in regard to any considerations given by
8 ASCAP for a lower percentage than the 1.21 for radio and .83
9 for television, I offer as additional support that testimony
10 and I quote Commissioner Burg:

11 "Q Dr. Fagan, with respect to the percentage fees in
12 radio 1.21 and in television. 83, when were those fees, and
13 how long have those particular percentiles you presented have
14 been in effect? Were they carried down from the mountain on
15 stone tablets years ago, or how did you arrive at those
16 particular numbers?"

17 Dr. Fagan:

18 "A The percentage 1.21 in radio and .83 in television
19 is the percentage that one arrives at when one takes the
20 ASCAP collections in radio and in television, and compares
21 those collections with the amounts reported to the FCC, and
22 come out in the summaries, the 324's, broadcast revenue. It's
23 that relationship. Those particular numbers are not contained
24 in any license agreement."

25 Paraphrasing the letter part of Commissioner Burg's
questioning:

"Q My question really is how hard are those figures
or have you given any consideration to, not a discount, but

1 to a different percentage in terms of overall agreements?"

2 Dr. Fagan, letter part of his quote:

3 "A With respect to the last aspect of your question
4 as to whether we have considered, you said, in place of dis-
5 count, give a lower percentage -- yes, we have. We think
6 frankly that a lower percentage is the same thing as the
7 discount."

8 Commissioner Burg:

9 "Q Except that it could go on into perpetuity; whereas
10 a discount could apply for one year, two years or four years;
11 is that correct?"

12 Dr. Fagan:

13 "A But the percentage presumably can be changed as
14 conditions changed. Whatever is done there is a time limit
15 I'm sure and a time when you come back and see how the
16 industry has changed in that period, and what's appropriate
17 at that time.

18 Now you also asked, I believe, as to whether
19 these percentages have been set for many, many years. They
20 have not. The license agreement generally runs five years
21 And the percentages are set for that period and then change
22 at a subsequent period."

23 Commissioner Burg:

24 "Q But you have considered a different percentage
25 in terms of public broadcasting?"

Dr. Fagan:

"A Yes, we have."

Based on the above, I have reduced the rate, and

1 please note I said reduced and not discounted. ASCAP is
2 seeking by 50% rounded to the nearest tenth of a percent,
3 making it .4 per cent for television and .6 percent for radio.
4 Such rates to be applicable until December 31, 1982.

5 While I appreciate that the original percentages
6 to be applied to gross income offered by ASCAP are net of all
7 deductions allowed to commercial broadcasting, Public Broad-
8 casting's gross income is made up of several items, such as
9 indirect, in-kind, and college contributions, which are unique
only to Public Broadcasting.

10 Therefore, I further propose that an additional
11 25% and 10% standard deduction from gross income be granted
12 to television and radio respectively until December 31, 1982.

13 I offer as additional support for the standard
14 deduction, testimony by Dr. Fagan upon questioning by Com-
15 missioner Coulter. His testimony establishes the standard
16 deduction as an accepted industry practice. Dr. Fagan refers
to it in his testimony as "optional standard deduction".

17 If you follow my logical approach that commercial
18 broadcasting is to be used as the bench mark for establishing
19 royalty fees by non-commercial broadcasting, and that as an
20 accepted industry practice ASCAP has allowed standard de-
21 ductions, then in my opinion those things which are unique
22 only to public broadcasting should be deducted from the base
23 gross income used to compute the royalty fee by using a
standard deduction to allow for such uniqueness.

24 I arrived at the above percentages by analyzing
25 data summarized for the Tribunal and submitted with the ASCAP

1 prehearing brief. They obtained such data from Corporation
2 for Public Broadcasting, Management Information Systems,
3 Financial Summary Report for PTV Licenses: Fiscal Years
4 1973-1976 - Appendix A, Table 1, page 13. The same report
5 for the CPB Qualified Radio Station, Table B, page 2.

6 In addition to the above data to determine the
7 standard deduction percentages, I also reviewed, during my
8 visit with Eric Smith, a handful of actual annual reports
9 filed by the individual stations with PBS.

10 PBS had two major concerns regarding the ASCAP
11 gross revenue method; one, that fees would be paid twice on
12 certain revenues and two, that fees would also be paid on
13 revenues of producing entities such as the Children's
14 Television Workshop. Under my proposal these types of revenues
15 would not be subject to royalty fees. We would only be
16 concerned with revenues of transmitting or should I say
17 broadcasting entities to the extent that the CPB support
18 organizations are non-broadcasting entities such as the
19 Children's Television Workshop, these revenues shall not be
20 subject to royalty fees.

21 Also, to the extent that a local, state or regional
22 station, network, PBS and NPR have made inter-company payments
23 to other affiliates which come under our jurisdiction, these
24 payments received shall be deducted from gross revenue. This
25 will eliminate the problem of royalty fees being paid on
duplicated revenues.

Mr. Chairman and Commissioners, the essence of
my proposal is this: (1) that the royalty fees due ASCAP by

1 public broadcasting be computed upon using gross revenue of
2 all transmitting entities;

3 (2) Gross income is income received from all
4 sources by the individual broadcasting entities;

5 (3) A 25 percent and a ten percent standard
6 deduction from gross revenues be granted to television and
7 radio respectively, until December 31, 1982;

8 (4) After all duplicated income is eliminated
9 and the standard deduction is applied, the remaining gross
10 income is subject to royalty fees of .4 percent for television
11 and .6 percent for radio until December 31, 1982.

12 As part of the CPB internal controls for PBS
13 and NPR, each member station submits a comprehensive financial
14 statement called the CPB annual financial report and infor-
15 mation survey, which accounts for all their income and
16 expenses. The above computation can easily be computed
17 by each of the broadcasting entities without having to go
18 to any additional burden.

19 Since the fiscal year ends September 30th, each
20 station submits their statements to CPB by calendar year
21 end. In reviewing the data submitted to the Tribunal by
22 PBS, the independent audits of the financial position of
23 PBS, NPR and CPB are also completed within this time span.

24 Therefore, I propose that the fee be computed
25 on the applicable gross income as of September 30th of each
fiscal year, which would be payable in two equal payments
to ASCAP in the following calendar year on January 31, and
July 31; provided, however, that payment of fees for uses in

1 1978, subsequent to the effective date of this schedule need
2 not be made until January 31, 1979 and will be 50% of the
3 total fees due computed on the September 30, 1977 gross income
4 as previously defined.

5 Mr. Chairman, I ask you and each one of the
6 Commissioners to adopt this revenue method formula.

7 CHAIRMAN BRENNAN: Thank you, Commissioner. Any
8 requests at this time?

9 COMMISSIONER COULTER: Just a couple of observations
10 as to Commissioner Burg's proposal is that I think it has --
11 it is at least a fairly neutral and new proposal and it is
12 simple, the basis upon which it could be established are
13 verifiable standards. In other words, they can be provided
14 by neutral sources like Arbitron and Neilsen and I think it
15 has that virtue.

16 The only problem I might have with Commissioner
17 Garcia's proposal is the potential difficulty of these
18 different deductions and establishing which income is indeed
19 which.

20 CHAIRMAN BRENNAN: Thank you.

21 COMMISSIONER BURG: Mr. Chairman?

22 CHAIRMAN BRENNAN: Commissioner Burg.

23 COMMISSIONER BURG: I have one question, Frances.
24 You said that the standard deductions of 25 percent and ten
25 percent end on December 31, 1982. Why, and then what happens?

26 COMMISSIONER GARCIA: Yes. We understand it would
27 be reviewed again every five years. It would be open to --

28 COMMISSIONER BURG: You're just not trying to make

1 a precedent here?

2 COMMISSIONER GARCIA: Right.

3 CHAIRMAN BRENNAN: I think it might serve a useful
4 purpose if we were at this point in the proceedings to allow
5 representatives of the parties to make any comments on these
6 proposals that they may desire. I know on previous occasions
7 when this has arisen there have been suggestions that perhaps
8 that we ought to allow some time for reflection and study.
9 Unfortunately, because of the mandate of the statute, it is
10 not possible to defer the request for comments. But, I do
11 believe it would be helpful to extend this opportunity to all
12 the parties, and as far as Commissioner Garcia's proposal is
13 concerned, I would particularly welcome comments on the con-
14 cerns expressed by Commissioner Coulter as to some of the
15 problems in allocating the various types of revenue.

16 Possibly, a good approach might be to now recess
17 for ten minutes to allow everybody to collect their thoughts
18 and we will come back at eleven o'clock.

19 (A recess was held.)
20
21
22
23
24
25

1 CHAIRMAN BRENNAN: The meeting will resume and we
2 shall follow alphabetical order by association and the Chair
3 recognizes Mr. Korman on behalf of ASCAP.

4 MR. KORMAN: Thank you, Mr. Chairman. I think it
5 will come as no surprise to the members of the Tribunal
6 that ASCAP supports the revenue rather than the population.
7 And, in our last communication to the Tribunal, we pointed
8 out that the public broadcasters themselves have used market
9 population and had dropped it and weakened. We urge the
10 Tribunal to not to resurrect it for this purpose.

11 There are also problems in population when one
12 considers that there are a number of stations in, for example,
13 the New York market, some V's and some U's and some sort of
14 adjustment would have to be made and I don't know -- at
15 ASCAP we have not been able to come up with any means of
16 distinguishing these different stations in the New York
17 market. Also, we pointed out that the cable is becoming
18 more and more important. In Manhattan there are a large
19 number of cable subscribers and the quality of reception
20 is identical, no matter what the station may be in the New
21 York market. You get just as good a picture from the small
22 Long Island view as you get with respect to Channel 2,
23 Channel 4 or Channel 13. They all come in bright and clear
24 and colorful.

25 We also have a problem on how you would adjust
under Commissioner Burg's approach for inflation. I suppose
that could be factored in, but really we don't think that if
you make that sort of adjustment you would be properly

1 reflecting the growth of public television viewing by looking
2 at the population.

3 I am not entirely clear on Commissioner Garcia's
4 proposal as to which revenues would be included in the base.
5 That, of course, is a critical matter. The support organi-
6 zations are listed in CPB's status report from 1977 on
7 pages one and two.

8 I believe, with all of them, with the exception
9 of CPB itself and the National Association of Educational
10 Broadcasters, Children's Television Workshop and Family
11 Communications, Inc., can possibly -- I'm sure about this --
12 mid-Eastern Educational Television, Inc., and Agency for
13 Instructional Television/National Instructional Television
14 Center. All the remaining ones, except those that I men-
15 tioned are, in fact, transmitting and performing entities.

16 We would assume that it is Commissioner Garcia's
17 proposal that the revenues for all of the others, but not
18 for those that I have specified would be included in the base
19 and I would like to ask if that understanding is correct.

20 Mr. Chairman, may I address that question to
21 Commissioner Garica?

22 CHAIRMAN BRENNAN: Just a minute. Mr. Korman,
23 are you also referring to the listing which appears in
24 the CPB financial report on page 37?

25

3

1

MR. KORMAN: I believe it's the same listing.

2

3

CHAIRMAN BRENNAN: That's the same listing. I was following you and it appeared to be the same listing.

4

5

MR. KORMAN: Yes, it is. I'd like to take a minute or two. I believe it's the same, Mr. Chairman.

6

7

There may be one or two differences, but I believe it is

8

the same. It winds up with the same. Well, maybe it is not

9

the same. Mr. Zelenko and I are counting different. I

10

count 16 in the document I read from and he is counting 16--

11

CHAIRMAN BRENNAN: In any event, the question is

12

does Commissioner Garcia's proposal include all broadcasting

13

transmitting entities and exclude all the purely production

14

entities?

15

MR. KORMAN: That is correct, including the networks as performers. Is that the intent of the proposal?

16

17

COMMISSIONER GARCIA: Yes.

18

CHAIRMAN BRENNAN: The next question would be,

19

and we'll pursue this with PBS I suppose, would be to attempt to identify which would be classified as production.

20

21

MR. KORMAN: I think based on the best estimates

22

we can make, Mr. Chairman, that the amount of the revenues

23

of these non-performing entities are in the order of perhaps

24

\$15 to \$20 million or were based on 1976 figures. I don't

25

know just what they are. We are talking about a number that

1 would be excluded in the order of \$15 to \$20 million.

2 Assuming that that is what Commissioner Garcia's
3 proposal intends, we think that the slash production in
4 rate is too deep. The cut is too great. We said that we
5 thought that there should be a discount in the order of
6 one third to one half because that is what many others who
7 dealt with the public broadcasters were doing and that dis-
8 count would be off the commercial rates.

9 Now, the only -- well, perhaps the closest, I
10 should say, analysis is probably the SESAC agreements. SESAC,
11 as you recall, told us that it got to its number by looking
12 at the amounts it would charge commercial broadcasters in
13 granting a 50 percent discount. Perhaps ASCAP would have
14 been well advised to have been represented here by Mr.
15 Ciancimino and would have persuaded the Tribunal that a
16 50 percent discount was ample and a further discount of
17 25 percent is really asking for a greater contribution on
18 behalf of composers to public broadcasting, and they should
19 be asked to contribute.

20 I am not referring now to any of the past unhappy
21 feelings or relationships that lead to or have led to no
22 payments whatsoever having been made up to the date that this
23 Tribunal publishes the reasonable rates and terms.

24 I think that looking ahead a discount of 50 percent
25 off the commercial rates, and remember that our proposal gave

1 the public broadcasters full credit for all the deductions
2 that the commercial broadcasters got, whether by way of
3 itemizing them or by way of the optional standard deduction.
4 I don't follow that logic of granting any additional standard
5 deduction, whether at 25 percent or ten percent.

6 I assume that the reason it is being proposed
7 is that the dollars that would otherwise be produced seem
8 to Commissioner Garcia and perhaps other members of the
9 Tribunal to be too high. I don't share that view. If it
10 is in any degree based on the notion that there are special
11 kinds of income unique to public broadcasting, I think that
12 is a misconception.

13 The one kind of income that was mentioned by
14 Commissioner Garcia as being different was in-kind income.
15 It is not different at all. The commercial broadcasters
16 received income as in the trades, and the FCC has recently
17 required that this income be reported. When it is reported
18 it becomes subject to be at full value. There is no discount
19 for it. It doesn't matter, as you said, I think in your
20 Weekly Labor Report, whether a car is purchased or a studio
21 is purchased for cash or given away, it has the same value
22 as if it had been given away by a donor. It has the same
23 value to the recipient.

24 I do not think that in-kind income, whether it
25 be real property or services, I think technically services are

1 not included if they are voluntary services unless they are
2 professional services. But, the services of a lawyer, or
3 economic expert, are included or an accountant. These are
4 included. When they are traded for, they have the same kind
5 of value that any other thing of value has.

6 In short, I see no reason to have any additional
7 discount below the 50 percent and I don't really think the
8 record here supports it. However, I recognize that the
9 Tribunal has wide discretion and that you are expressing a
10 problem for the first time.

11 Let me, on that note, mention that the suggestion
12 of Commissioner Burg is extraordinarily ungenerous compared
13 to what our friends in Canada do where the fees are in the
14 order of, if you're going to a per capita basis, they are
15 now about five cents. For us to be getting about ten, it
16 seems strange.

17 I might add that in Canada the rates are probably
18 a good deal lower than they would otherwise be or would be
19 in European countries, because there is a certain chauvinism
20 reflected by the Copyright Appeal Board in Canada. Canadians
21 know that most of the money collected, both by CABAC and by
22 PROCAP, comes back to the United States, because the copyright
23 owners of that music are Americans and the music that is most
24 popular in Canada is American music. The Canadians are not
25 all that happy to see the money funneled back to the United
26 States. The rates there are lower than they would otherwise
27 be because of that factor.

28 In any case, for us to come up with rates of a half

1 a cent against the Canadians' five cents is, as I say, quite
2 generous, even assuming that the public broadcasters need
3 some help at this very first time of payment which we don't
4 know that they do.

5 Now Commissioner -- incidentally, our estimate of
6 the total amount that Commissioner Garcia's proposal would
7 reduce is in the order of a million three, and I wonder whether
8 that is also the Commissioner's estimation based on 1976
9 revenues or otherwise. Does it work out to that million
10 three?

11 COMMISSIONER GARCIA: Yes.

12 MR. KORMAN: As to Commissioner Coulter's question
13 or his indication that he might have a problem over the
14 difficulty in tracing the money, I would assume that
15 in the time that has passed since the hearings the Tribunal
16 has had an opportunity to verify the facts which we presented
17 in our post hearing statement to the effect that duplicated
18 revenues are not a problem because the public broadcasters
19 now segregate them for purposes of reporting CPB.

20 I just think there is no potential difficulty
21 there, but that is something where Commissioner Garcia, with
22 her expertise in the auditing field can no doubt advise the
23 Tribunal much better than I. I don't believe there is any
24 problem and that, Mr. Chairman, concludes our comments.

25 CHAIRMAN BRENNAN: Commissioner Coulter had a
question.

COMMISSIONER COULTER: No.

CHAIRMAN BRENNAN: It's been covered.

1 Mr. Korman, could you comment a little bit more
2 about the Canadian issue which seems to periodically appear
3 and then disappear? I'm going to ask the same question of
4 Public Broadcasting later on.

5 MR. KORMAN: Mr. Chairman, I have not seen the
6 official report of decision of the Copyright Appeal Board in
7 Canada. I have some notes of telephone conversations that
8 someone else had, so I don't know that this is gospel, but
9 this is a reliable reporter normally. I'm told that for
10 CBC radio and television, and I don't separate these out,
11 the Board approves an overall increase of about ten percent.
12 CABAC got about a seven percent increase going up from 1.2
13 million to 4.94. They are now up to 5.29 cents.

14 PROCAP went up more and they went -- they had
15 been getting 380,000 and they went from 1.41 to 1.76, still
16 considerably below ASCAP, but a greater percentage of increase,
17 an increase of about 25 percent.

18 There was no change in the television, commercial
19 television tariff which remains at 1.6 percent for CABAC, .8
20 percent for PROCAP.

21 CHAIRMAN BRENNAN: Do you have any personal knowledge
22 as to what factors were considered in making those percentage
23 adjustments?

24 MR. KORMAN: I do not, Mr. Chairman, have any
25 personal knowledge of any. I would, if the Tribunal requests,
of course, get on the telephone and find out what I can about
it. I don't think there has been a written published report
as yet. What I would get, I suspect, would be the views -- I

1 know would be the views of CABAC. The public broadcasters
2 have put in some information and I'm sure they are in touch
3 with the Canadian broadcasters and could no doubt furnish the
4 views of broadcasters of CBC.

5 Incidentally there was an increase also in private
6 radio where the rates went up from three to 3.2 percent over
7 all and there the adjustment is, to complete what I have, was
8 a reduction for CABAC from 1.85 to 1.75, and an increase for
9 PROCAP from 1.115 to 1.45 percent.

10 That exhausts my knowledge on that subject.

11 CHAIRMAN BRENNAN: I'm sorry it exhausts your
12 knowledge because it hasn't answered all the questions of
13 Commissioners, but perhaps Mr. Smith or somebody else later
14 can respond to these additional questions.

15 Are there any questions for Mr. Korman?

16 (No verbal response.)

17 CHAIRMAN BRENNAN: If not, thank you Mr. Korman,
18 and I will now call upon a representative -- whenever I do
19 this with Public Broadcasting I get in trouble as to whether
20 I should recognize a director or the counsel. So, I will
21 recognize a spokesperson for Public Broadcasting.

22 MR. ALEINIKOFF: If you don't mind, I think I will
23 lead today, whatever I am. We have obviously given this
24 matter very deep consideration in the last 15 minutes and
25 with us and I think we know exactly where we stand just the
26 way ASCAP knows where they stand on their position.

27 We have said in our letter to the Tribunal we think
28 a population approach is an interesting approach. We had

1 originally, as you will remember, thought the proper approach
2 for Public Broadcasting might very well be a per use approach.
3 The Tribunal has decided apparently that that is not a
4 worthwhile way to assess fees in this case. In that situation
5 we know that the population we serve is the best ratio of
6 what it should be.

7 I'd like to say just two general things. The first
8 is what we have repeated many times in these proceedings
9 that public broadcasting in America does feel that it is
10 serving the American people. We don't divide between stations,
11 between areas. We don't worry about coverage or doubling
12 coverage or tripling coverage. We are serving the people
13 of the United States.

14 In our figures that we supplied to Commissioner
15 Burg, we attempted to include everybody who could receive
16 a public broadcasting signal, whether it was over the air
17 or whether it was by satellite, or whether it was by cable
18 extensions of the station and to some extent the figures
19 that we have have cable extension included already in the
20 figures.

21 So when we have UHF stations and we took a discount
22 for UHF, we reapplied the figures that would make it possible
23 for those UHF stations to be heard by way of cable extensions
24 in the same communities or even outside those communities.
25 What we are interested in is service by public broadcasting
to the American population.

If we are going to do a fee based upon population,
we believe that everybody should be included that can hear.

1 We have told many, many times before that the number of the
2 population that listens may be a small number comparatively.
3 We don't want to get into the rating business again, but
4 obviously there is a problem not only having to do with the
5 mechanical equipment, but also the kinds of programs that we
6 produce.

7 We would like it to be as big an audience as
8 possible, but obviously it isn't.

9 Having said that, on the one side for public
10 broadcasting, I think we have been consistent in this, we are
11 serving the American people. The way we think a fee should
12 be assessed is on a national basis. No doubt we will assess
13 the fee for ourselves on a national basis. Whether it is
14 allocated in one way or another will depend upon what our
15 constituencies say, but it will be a national project, which
16 is what we have been doing.

17 Therefore, we hope that whatever can come out of
18 this population will be on a national basis. If the Tribunal
19 wants to assess these stations by area, I think that would be
20 a large mistake, simply because there are overlaps, there are
21 double stations.

22 There will be progressively in the next several
23 years when we get into satellite transmission hook-ups of
24 all kinds of regional networks. It will be a difficult
25 thing to do, to allocate between the kind of coverage that
26 there is where the rates in the school station that only
27 covers a school campus which will increase, or whether it's
28 a larger station that covers the whole market area.

1 We would prefer to include anybody that sees or
2 hears a signal. On the other side, I do want to point out
3 and repeat and emphasize just one thing.

4 We are talking in terms of ASCAP, of performing
5 rights, which are transmittal rights, which are broadcasting
6 rights. We are also talking about one organization out of
7 three, at least, and we are talking only about one portion
8 of the spectrum of performing rights.

9 Mr. Ciancimino is here. BMI has a large repertoire.
10 We are talking about a single organization. Therefore, I
11 hope that we won't get caught up in terms of comparison when
12 we compare with Canada or when we compare with anything else
13 as to what the total music cost for broadcasting as against
14 a single institution.

15 The second thing is, if we are talking transmission,
16 we probably should be talking about licensing those who per-
17 form, and licensing and gearing the fee into the income of
18 the transmitting stations.

19 I must say, Commissioner Garcia, I thought that
20 what you were saying -- and I wrote down a couple of notes
21 as you were talking about the income of transmitting organi-
22 zations, which I think is a simple thing to decide if you
23 take it overall. I have a problem when you lapse between
24 transmitting organizations and between transmitting organi-
25 zations and producing organizations. It is an inter-con-
necting organization. The transfer runs back and forth from
the Federal Government to CPB to the stations, and back
into PBS to produce programs, and then back again to a

1 producing entity that actually produces the program. It's
2 a long twist there, and it can be a difficult one.

3 I think we were looking at just the budgets of the
4 transmitting stations, there is no question in my mind that
5 you can use a very simple computer to add up the total budget
6 of every station in the network. That's not a difficult
7 thing to do, but that's the income of the transmitting
8 stations.

9 I don't know how you work that in with the PBS or
10 the CPB, or some of the other involutions. I think you are
11 probably as familiar as I am with those reports now, but it
12 does seem to me to be fair -- if we're talking about fair --
13 to key the payments to the transmitting organizations because
14 ASCAP nor BMI are any different. We are only talking about
15 performing rights, not about recording rights, not about
16 production rights, not about any other rights involved,
17 but only about broadcasting rights, which is the function of
18 the broadcaster that puts that signal out. It's not the
19 function of the network that produces the program.

20 They have a different kind of a set up in commer-
21 cial broadcasting because the networks tend to take on the
22 performing rights obligations for the stations.

23 When you start to compare our rates with the rates
24 of the commercial networks. I think that you do get into
25 some apples and oranges because there is a fixed fee for

1 the commercial networks which takes care of the transmittal
2 rights, the broadcast rights, on network programs, separate
3 and apart from the fees that are paid by the stations for
4 broadcast rights for other than network programs and,
5 therefore, I would say that from our point of view, since
6 we are such an integrated system, if you're going that way
7 you would want to look at the income of the transmitting
8 stations for all programs -- national, local, regional --
9 and then apply that, and that can be simply applied.

10 These are the two larger aspects. I'd like to say
11 a couple of things in terms of some of the specifics and
12 the national audience figures.

13 Commissioner Burg, we gave you the best figures
14 we could come up with in the time we had. So, they are not
15 official figures. We have done what we could to get you
16 those figures, and I was surprised we could even come up
17 with those, to tell you the truth.

18 There is growth included in terms of expansion,
19 the number of people, the larger audiences, and all I can
20 say is that it seems to me that by 1982, if we have a
21 larger number of programs, and a larger number of stations,
22 or a larger amount of audience actually using our programs,
23 that can be taken care of in 1982, in the next five years,
24 four and a half years, and it seems to go pretty fast when
25 you're working at it this way.

1 We have on the market population theory formula,
2 we have a couple of problems; one is the half a cent,
3 which I think you've come up with, I assume, by comparison
4 purposes.

5 We have always considered ourselves, whether we
6 compared ourselves to the Canadian non-commercial stations,
7 the educational television stations, that perhaps that one
8 half a cent might be applied to all music. In other words,
9 we do have outstanding commitments to BMI and to SESAC, as
10 well as to Harry Fox, and a half a cent if it's worthwhile
11 considering it this way, for Congressional purposes, and for
12 any other kind of purposes may be a payment for music rather
13 than a payment for ASCAP.

14 It just seems to us that that might be a better
15 formula. More important, however, is the radio/television
16 comparison.

17 We've tried to emphasize over and over again that
18 public radio not only has infinitesimal audiences compared
19 to commercial radio, but it's a completely different bag
20 from the commercial radio. Its income is somewhere in the
21 neighborhood of eight or 10 to one compared to public
22 television.

23 At this stage and in the foreseeable future, we
24 don't expect it to be anything more than what it is on a
25 real comparative basis. Sure we go up in the thousands, but

1 go there. I think that you would have had to have worked
2 at ASCAP for a large number of years to really understand.
3 However, I'm always confused by the fact that when I talk
4 to the commercial radio stations who have been negotiating
5 with ASCAP and with some television people that the kind of
6 numbers that I get in percentages don't get very much above
7 one percent for commercial radio or commercial television
8 stations.

9 It always seemed to me that the percentages that
10 ASCAP is quoting for public broadcasting at times are even
11 higher when you take all those deductions and all those
12 other things in commercial stations.

13 But I understand that when you are talking about
14 a standard deduction of 25 percent and then the 50 percent
15 ratio, I understand that you are trying to do something to
16 make it more comfortable for public broadcasting stations.

17 Again, we can't really quarrel with your percent-
18 ages. We think they are high, as you would no doubt think
19 we would. We feel that the overall amount you arrived at
20 is higher than what we had ever considered would be the
21 fee payable to ASCAP, based upon our other agreements, and
22 based upon where we think we are.

23 But those are the percentages that you have come
24 up with, and I assume you have some way of getting there,
25 in addition to the way you've indicated so far.

1 it will not, when you talk about comparisons. Our compari-
2 sons, in all of our agreements so far, and in every way
3 we've been able to obtain figures having a 10 to one ratio.

4 I believe yours was a two-to-one, a three-to-one
5 ratio. It really is not fair if you're allocating as to
6 rate to make them pay on that basis. Their overall base is
7 much lower, simply because they have a larger coverage with
8 FM stations. Their income will still be very much smaller,
9 and it will be a hard thing for them to be able to pay
10 on a two-to-one or a three-to-one basis.

11 We have always taken this position. The fair and
12 proper share is 10-to-one, and I think we have to support
13 that here and point that out to you. I don't know if it
14 would make very much difference in the overall fee, since
15 you've got such a reduced base that's involved.

16 It seems to me that probably the overall fee will
17 not change drastically, but it would make a difference to
18 radio people.

19 On Commissioner Garcia's proposal, we have all of
20 the same problems that we talked about before, unless it's
21 limited to transmitting organizations. That is something
22 that I've never been able to understand from my friends at
23 ASCAP. I do not pretend in any way to be an expert on
24 ASCAP licensing, nor on the commercial networks and other
25 formulas for distribution, or any of the other things that

1 I, again, want to point out to you, though, this
2 whole radio thing. You've got a higher percentage for
3 radio than for television. If we feel that their income
4 is 10-to-one, and even though it takes care of it a little
5 bit, based upon the fact that their income is less, there-
6 fore, you have a lesser amount, it is a little bit embarrass-
7 ing to us to have a higher amount, a higher percentage for
8 radio than we have for television.

9 I think it was derived by ASCAP from their
10 experience with commercial radio stations, but please
11 remember the commercial radio stations have 40 or 50, 40
12 percent of the income of commercial broadcasting and ours
13 have, again, a 10-to-one ratio.

14 So, we feel that that number should be a little
15 bit less.

16 Now, may I get to your question, Mr. Brennan, on
17 Canada, and that is simply that we have not discussed to
18 great length with the CBC. We know that they use per capita.
19 I assume that Mr. Korman's numbers -- which I'm not sure
20 I understood -- are accurate.

21 CHAIRMAN BRENNAN: You say you know that they use
22 per capita?

23 COMMISSIONER BURG: I'm not sure of that at all.
24 I would think they don't, but give us your information.

25 MR. ALIENIKOFF: I believe that they do and we
will submit this to you. It is our understanding that there
is a per capita fee and that what Mr. Korman was quoting was

1 per capita fees that have been established on the CBC.
2 They are higher than what we are talking about, what
3 Commissioner Burg is talking about for the CBC.

4 We do not believe that the educational television
5 stations have a per capita fee; they have a lump sum fee.
6 There's a difference between the two, and that's what I
7 want to get at.

8 The educational television stations have lump
9 sum fees, which, for the purposes of our discussion with
10 you, and I thought it came out clearly in our letter, we
11 had divided per capita to reach whatever those numbers
12 got to be.

13 I can only repeat that the CBC not only uses a
14 great deal of American music, it uses a great deal of
15 American programs. Most of that American programming is
16 broadcast on a commercial basis under the CBS, NBC and ABC
17 network agreements. They are a commercial network. They
18 are selling advertising, and they are participating in
19 advertising revenues.

20 Therefore, we feel that a comparison with them
21 is just like a comparison with CBS or ABC, which, even
22 in your figures, there's a great differential for American
23 use, and that's why when we talked about the educational
24 television stations, we felt that they were the correct
25 comparisons, and I think they came out to someplace near

1 where Commissioner Burg's figures were.

2 Are there any other questions?

3 CHAIRMAN BRENNAN: I'm sure there will be, Mr.
4 Aleinikoff. If we were to adopt Commissioner Garcia's
5 proposal, Mr. Aleinikoff, I take it you foresee a number of
6 disputes as to how certain revenues should be allocated,
7 what should be included, what should be excluded?

8 MR. ALEINIKOFF: I'm afraid that I'm not
9 absolutely clear about Commissioner Garcia's proposal. If,
10 as I said, as I thought, it was limited to transmittal in-
11 come, and, if you set as your guideline the fact that it
12 is the budget of the 200 and whatever they are television
13 stations, 200 and some odd radio stations, and all you did
14 was to take their annual accounting budgets as audited, and
15 almost all of them are audited, and added them up, I don't
16 think there'll be any dispute about that, especially if you
17 have standard deductions.

18 I think that the problem gets to be when you
19 begin talking about exclusions, when you talk about ex-
20 cluding -- not in kind, because that's standard, but
21 excluding, then you automatically exclude the CTW money or
22 the money from independent producers, or the independent
23 productions that are given to public broadcasting; is
24 that not correct?

25 CHAIRMAN BRENNAN: Before I yield to my colleague,

1 let me ask just one or two other questions, Mr. Aleinikoff.
2 If there are such disputes, how would they be resolved? Who
3 would resolve them?

4 MR. ALEINIKOFF: I have no idea. Your rules are
5 going to have to take of that. Either your rules are going
6 to be so specific that there can't be any. I have absolutely
7 no idea. I assume if you have regulations and hand down a
8 decision and there's a dispute between ASCAP and us about
9 whether something should or should not have been included,
10 it is going to have to be some court of authority, some
11 ultimate authority --

12 CHAIRMAN BRENNAN: You used the term "court of
13 authority." Do you mean court in the customary meaning of
14 that term, Mr. Aleinikoff?

15 MR. ALEINIKOFF: I assume that you're asking me
16 for something. This is not my advice, as you know, and
17 I'm not sure whether you're making my case or somebody
18 else's. I agree it's a difficult thing to do. The only
19 alternative I know is a court, yes. I don't know of any
20 other way, unless we can agree with ASCAP independently
21 on arbitration kind of a thing.

22 I would think that whoever it was --

23 CHAIRMAN BRENNAN: That might upset Chief Justice
24 Burger to add to the workload of the Federal courts.

25 MR. ALEINIKOFF: It does seem to me that that's

1 the only way that it could possibly be done by applying on
2 the basis that the regulations of the Tribunal under the
3 statute have been violated. I don't know any other way to
4 do it. But I can only say that we, certainly, would prefer
5 to avoid anything of that kind.

6 CHAIRMAN BRENNAN: Mr. Smith was sort of tugging
7 at your coat tail. Do you want to be recognized, Mr. Smith?
8 If you wish to, we will be glad to hear you.

9 MR. SMITH: I just had one or two things to add.
10 On the question of CTW, it has always been my understanding
11 from the previous meetings and also from what you said,
12 Commissioner Garcia, that the revenues of the transmitting
13 organization would exclude revenues of production houses
14 such as CTW, and I just wanted to note here that there are
15 other production houses who produce for public television,
16 not associated whatsoever with our system, other than CTW,
17 and other than those stations listed in that particular
18 survey. That survey refers only to those organizations
19 which report, but there are other producers who can come
20 under your proposal, I think, also.

21 The other thing that I wanted to note is the
22 question of timing, and I'm not sure I understood what your
23 proposal was in terms of the revenue proposal, as to what
24 -- our problem is that our reporting system that we have in
25 place is always a year behind, and I listened very carefully

1 to what you said on how that would work out, and I didn't
2 quite understand whether for '78 you would use '78 income
3 or '77, because that might create -- if the Tribunal accepts
4 a revenue base proposal as to how that would work.

5 COMMISSIONER GARCIA: Mr. Smith, in regard to your
6 question, the 9-30-77 figures will be used to compute this
7 year's, okay. And then you would just do it in equal
8 payments.

9 For instance, in January 31st, 1979, you will
10 have two payments, one for the last half of '78, and one
11 for the first half, and then you would use the 9-30-78
12 numbers and pay for the first half of '79 on January 31st.

13 MR. ALEINIKOFF: I think that what Mr. Smith was
14 asking was do you key the fee for the next year by the
15 previous year's income? Is that correct?

16 COMMISSIONER GARCIA: If I understand correctly,
17 Mr. Smith, from our visit that day, I understand what you
18 are saying that the numbers are certified one year later to
19 the Treasury, and that's where you get some of these numbers
20 from.

21 But also from my discussion that particular day,
22 I ascertained that all these numbers are ready to be
23 compiled at no later than year end. The individual,
24 independent audits, and also the memberstations all submit
25 their data to you prior to year end within a set three or

1 four month period of September 30th to 12-31-7 --

2 MR. SMITH: But for the preceding calendar year?

3 COMMISSIONER GARCIA: No.

4 MR. SMITH: Well, I --

5 COMMISSIONER GARCIA: That wasn't my understanding.

6 MR. SMITH: It's a year behind when we finally
7 get the numbers.

8 COMMISSIONER GARCIA: It's a year behind when you
9 compile it in here, but it's not a year behind when you get
10 the numbers, and I got that information from the data that
11 you submitted to us where you show your independent reports
12 by Price Waterhouse and Arthur Young. Those are done within
13 a two or three month period.

14 MR. ALEINIKOFF: I think that one way or another
15 that there are enough computers and accountants to be able
16 to accomplish what it is that you want to accomplish. The
17 problem that I find is much more conceptual, what figures
18 should be included and how they should be included.

19 And I thought that when I said I assumed that
20 CTW would be outside the station reports, and you shook
21 your head, did you mean it would not be? It seems to me it
22 would be by the very definition.

23 COMMISSIONER GARCIA: It seems to me that perhaps
24 I didn't understand what you were saying, Mr. Aleinikoff,
25 and I want to address myself to some of those questions.

1 You were suggesting that all support organizations
2 of CPB be excluded from the base; is that correct?

3 MR. ALEINIKOFF: (Non-verbal response.)

4 COMMISSIONER GARCIA: Okay. Some of those support
5 organizations are also transmitted organizations, are they
6 not?

7 MR. ALEINIKOFF: The support organizations that I
8 was talking about are not. CPB is not. PBS is not. NPR
9 produces programs it doesn't broadcast.

10 I was talking about the broadcasting entities
11 that are licensed by the FCC as transmitting organizations.
12 Those are the stations.

13 COMMISSIONER GARCIA: So, you're talking about
14 the stations, the local stations and state stations, and so
15 forth; is that correct?

16 MR. ALEINIKOFF: Just stations. All the other
17 entities are either inter-connecting entities or research
18 entities, or program-production entities. They are
19 different from the transmitting entities, and the point I
20 was trying to make is that those entities really don't need
21 an ASCAP license at all.

22 CPB can operate the way it does, and PBS can
23 operate the way it does without an ASCAP license. ASCAP
24 only covers broadcasting.

25 COMMISSIONER GARCIA: In other words, you are

1 suggesting that these entities do not come under our
2 jurisdiction?

3 MR. ALEINIKOFF: No. I think that you have the
4 right to -- I think that if you were to level a broadcasting
5 fee against CPB, that would not be within the statutes. I
6 think that you have a right to set a rate for the use of
7 performing rights, as far as ASCAP is concerned, but I
8 don't think that you could charge an organization that does
9 not use performing rights for that license.

10 COMMISSIONER GARCIA: But the funds from CPB
11 themselves are channeled into the stations. Is that not so?

12 MR. ALEINIKOFF: In some respects.

13 COMMISSIONER GARCIA: Right. I don't have the
14 figure handy, but in reviewing that, I think out of 120
15 million, there's only about 3.8 that stayed with CPB for
16 administration costs and so forth. The rest of it was
17 channeled into the individual stations.

18 MR. ALEINIKOFF: I can't give you the exact
19 numbers because they change.

20 COMMISSIONER GARCIA: I don't have to --

21 MR. ALEINIKOFF: But let's assume just for the
22 sake of this discussion that 50 percent go directly to the
23 stations of federal appropriations that have come in to
24 CPB and merely go out, they go right around into the station,
25 that's part of the station's budget. There's no question

1 about that. Whatever CPB gives to the stations for other
2 purposes are part of the station's budget, and that's why I
3 said if you add up all those station budgets, you're going
4 to come out with a number of the amount of gross income
5 that the transmitting entities that you've arrived ASCAP
6 performing licenses will have. That will include a great
7 deal of the Federal appropriations that are nominally CPB's.

8 COMMISSIONER GARCIA: And what happens to the
9 other 50 percent?

10 MR. ALEINIKOFF: I just took that number. Some of
11 it is used for programming, which can be through stations
12 or through other than stations. Some of it is used for
13 research. Some of it is used for inter-connection, inter-
14 connecting of the PBS inter-connection apparatus. Now,
15 whether that's a performing right or not is another legal
16 question, and I'm not sure it is for these purposes.

17 MR. KORMAN: Mr. Chairman, if I may interject.
18 The report from both the House and the Senate are clear
19 that a network is performing. So, that is not a legal
20 question. That's right in each of the reports. A network
21 is a performing entity under the Copyright Law.

22 MR. ALEINIKOFF: I'm sorry, but I really do dis-
23 agree with Mr. Korman.

24 MR. KORMAN: Well, that could be checked. That's
25 in black and white and can be read by anyone.

1 MR. ALEINIKOFF: You may say that but I think we
2 get into the double payments.

3 CHAIRMAN BRENNAN: I think Commissioner James has
4 been patient all morning, and he wants to ask a few ques-
5 tions.

6 COMMISSIONER GARCIA: I have one other question,
7 Mr. Aleinikoff.

8 Going back to an earlier comment, if I understood
9 you correctly, when you said these funds intermingle and
10 cannot adequately be identified, did I understand you
11 correctly in saying that?

12 MR. ALEINIKOFF: I don't think I said that.

13 COMMISSIONER GARCIA: Okay. Good.

14 MR. ALEINIKOFF: I don't think I said that.

15 COMMISSIONER GARCIA: Okay. Thank you.

16 MR. ALEINIKOFF: If I understand your question, I
17 don't believe I said that.

18 CHAIRMAN BRENNAN: Commissioner James?

19 COMMISSIONER JAMES: Yes. Mr. Chairman, I'd like
20 to hear Mr. Korman's response to some of Mr. Aleinikoff's
21 earlier statements.

22 CHAIRMAN BRENNAN: That's appropriate because
23 Commissioner Coulter has also indicated he has a question
24 for Mr. Korman. So, perhaps if Commissioner Coulter will
25 state --

1 COMMISSIONER COULTER: I'll wait.

2 CHAIRMAN BRENNAN: Then, Mr. Korman, you have a
3 chance to comment on the recent statements.

4 MR. KORMAN: Well, I think that subject to check-
5 ing, subject to the Tribunal's checking the representation
6 that I made a moment ago that the reports are clear that
7 networks are performing entities, Mr. Aleinikoff's suggestion
8 that you look only to the FCC licensees because the networks
9 themselves do not need licenses, they're simply drawn up,
10 the networks do need licenses, they are performing, and,
11 certainly in the commercial world the same argument could be
12 made.

13 When CBS transmits a program to its affiliates,
14 it uses the transmitter of one of those affiliates. It is
15 understood to be performing and the new Copyright Law
16 makes it clear that is, and so too is PBS, and so too are
17 the regional public broadcasting networks.

18 I don't quite understand what Mr. Aleinikoff was
19 referring to when he spoke of CTW money and the stations'
20 budgets. As I think of CTW, it's an organization that
21 receives money from a lot of different sources, including
22 a lot of money from selling toys. We are not talking about
23 any of that money.

24 It does get money from HEW. It does get money
25 from CPB, and I think it may get money from PBS. That

1 money that CTW receives, we are not saying ought to be paid,
2 unless it is paid to them because some entity such as PBS
3 paid some money to CTW. Then that money is subject to fee,
4 but not because it got to CTW, because it's a part of PBS',
5 or rather than some station that likewise makes a payment to
6 CTW.

7 I just simply cannot believe the question of
8 segregating money so as to avoid duplicated revenues as a
9 base for the fee. I simply cannot believe that is a prob-
10 lem.

11 The instructions are very detailed, very clear,
12 the instructions by CPB to the stations. This money is also,
13 and I cannot understand why we constantly come back to that,
14 with respect to Canada, if the Tribunal is interested, we
15 will get some more data.

16 There is a per capita fee in Canada. CABAC sought
17 to have that rate changed, and wanted it to be on a per-
18 centage basis, and the Copyright Appeal Board did not go
19 along with it. They did, however, increase by about 10
20 percent the amount that CBC was to pay, and that's not
21 separated between radio and television.

22 CBC, The Canadian Broadcasting Corporation, is
23 somewhat unlike Public Broadcasting here because it does
24 have some advertising. It is, as I understand it, mostly
25 a non-commercial operation, but not entirely. It has some

1 revenue from advertising.

2 Might I confer with my counsel for just one
3 minute?

4 COMMISSIONER JAMES: Mr. Korman, one of the ques-
5 tions I wanted you to address yourself to, and maybe I mis-
6 understood what Public Broadcasting was indicating, it
7 appeared to me that they were questioning the actual rate
8 that you get from --

9 MR. KORMAN: Oh, yes. Well, those rates --

10 COMMISSIONER JAMES: That's what I want to hear.

11 MR. KORMAN: Those rates, Commissioner James, are
12 in printed agreements which we have furnished. And here,
13 again, there is a point that seems to me that's been raised
14 to be confusing, and the situation is not at all confusing.
15 It is very simple. In both radio and in television there is
16 a rate. It is not in radio, 1.72, and in television it is
17 a little more complicated and there are two rates, the rate
18 of two percent and the rate of one percent.

19 You'll notice that all of those rates are above
20 one percent. Mr. Aleinikoff said that when he talks to
21 broadcasters he finds references to one percent, but what
22 he's talking about there is the effective rate after dis-
23 counts, when you compare after deductions, assuming the
24 agency discount is allowed, the agency commission on sales.

25 When you compare the fee to the gross that a

1 broadcasting station pays in television, it will come out
2 to the number that we presented, .8 percent. For radio, it
3 comes out to 1.21 percent. That's after all the deductions
4 when you're preparing the amount paid to the station's
5 gross. It's very simple. That's how we got the numbers
6 we proposed.

7 It isn't that we were depriving Public Broadcasting
8 any deduction. On the contrary, it was that we were de-
9 priving them of the thought of computing those deductions,
10 the necessity of keeping records. We were giving them the
11 benefit of all of the deductions bargained for in very hard
12 negotiations by the commercial broadcasters.

13 I really can't say any more about it.

14 COMMISSIONER JAMES: Is it fair to say -- there's
15 an affidavit that was filed in the federal court case up in
16 New York, which, I think, was requested by Public Broad-
17 casting, and you furnished it to us, dealing with radio,
18 where the rate for the last year, I believe, was 1.75.

19 MR. KORMAN: 1.725.

20 COMMISSIONER JAMES: Okay. That when you take in
21 your gross revenue and the -- the gross revenue of radio,
22 and apply it to the amount that you have received, that 1.21
23 that you eventually end up with has taken in those deductions
24 that Mr. Aleinikoff was referring to?

25 MR. KORMAN: That's correct. That's correct.

1 COMMISSIONER JAMES: No further questions, Mr.
2 Chairman. I'm ready to vote.

3 COMMISSIONER COULTER: Mr. Korman, obviously when
4 you are dealing with commercial television and you set a
5 rate based on their revenue, you don't make any distinction
6 between their production costs and their transmitting costs.
7 I mean, in some of your deductions there is some reference
8 to talent, that is deducted. In general, there is no
9 distinction between production or any other costs. Am I
10 correct? Did I phrase my question properly?

11 MR. KORMAN: In radio, production costs really
12 don't amount to very much. Radio stations --

13 COMMISSIONER COULTER: I'm alluding to television.

14 MR. KORMAN: Radio stations play records, and the
15 other costs, really, are for the use of service, and they
16 have very little in talent. There are certain productions.

17 Now, television is a different thing. In
18 television, when you're talking about local television,
19 again, with the exception of sports, what do you see in
20 local television? You see films, which the television
21 station acquire either from motion picture production
22 companies or from television program producers.

23 Television stations themselves do not generally
24 have very much in the way of production expense. There are
25 two exceptions to that. Local television stations do

1 receive -- some of them, not all -- large sums for producing
2 commercials, and they may on occasion have their production
3 facilities used for special kinds of programs. The Mexican
4 Olympics, for example, was a Dallas affiliate of ABC.

5 Now, that station in Dallas received income from
6 ABC for the use of its production facilities in connection
7 with ABC's broadcast of the Mexican Olympics. None of that
8 money was subdivided. It was outside the scope of the
9 agreement.

10 COMMISSIONER COULTER: It was outside the scope
11 of your agreement with that local affiliate?

12 MR. KORMAN: Because it was in relation to a net-
13 work program.

14 If a station of Westinghouse produces some
15 programs that are syndicated -- and you've got the Merv
16 Griffin Show, for instance -- when those shows are pro-
17 duced, there are considerable production expenses.

18 Now, the station is given an option. It can
19 either exclude the revenue that it receives from other
20 stations for syndicating that program from the base, in
21 which case it may not deduct any of the production costs.
22 It just treats the whole syndication process, revenue and
23 cost, as outside the scope of the agreement.

24 Or, it can take the deduction for the talent and
25 the other items that are thus filed in the agreement, but

1 then it must offset those costs by the revenues that it
2 receives. It has to make the election in advance as to how
3 it wants to be treated. You can't bet on the race after
4 it's over.

5 If it thinks its revenues are going to be less
6 than the costs, it will opt to include the whole deal within
7 the scope of the local reporting. If it thinks that the
8 revenues are going to be greater, it will opt to exclude.

9 Now, that's a complicated answer. This is all
10 really built into our proposal in the sense that what we've
11 done for public television is to take the net --

12 COMMISSIONER COULTER: No, I understand that. I
13 was just interested in the commercial treatment of produc-
14 tion revenues --

15 MR. KORMAN: I -- I'm sorry.

16 COMMISSIONER COULTER: The other question is,
17 obviously you have a different agreement with the networks;
18 am I correct on that?

19 MR. KORMAN: Yes.

20 COMMISSIONER COULTER: And there, obviously,
21 production is not excluded or is not treated separately. Am
22 I correct or not?

23 MR. KORMAN: Well, we have at the present time an
24 interim arrangement with all the networks. We have this
25 side battle with CBS, which is repetitious, to say the very

1 least, and that sort of stalled negotiations with all three
2 networks on a new agreement.

3 We did have percentage agreements very much like
4 the local station agreements through the '60s, and there
5 were considerable accounting disputes over what was and was
6 not to be included in the base towards the percentage that
7 was applied.

8 Partly for that reason, and also partly because
9 the network, CBS, made a very good, we thought then, pro-
10 posal, we switched to a flat dollar agreement with CBS, and
11 later with NBC and ABC.

12 So, they simply agreed to pay us X-dollars a year
13 for performing rights licenses, and their revenues and their
14 costs didn't figure in at all.

15 COMMISSIONER COULTER: Just a flat rate?

16 MR. KORMAN: Just a flat dollar sum.

17 Now, I think we testified, and if we didn't, I
18 would like to now, that ASCAP, as events turned out, that was
19 a very unfortunate deal for ASCAP. We are doing and shall
20 do all we can to reverse it and get back annual percent
21 increases, and the reasons are obvious. In addition to
22 inflation, the networks revenues just went through the
23 ceiling, and being kept at relatively flat dollars, we have
24 not shared as we think we should and as we had had prior
25 to entering into that agreement.

1 Also, in terms of the absolute value of those
2 dollars, they may have been significantly eroded. It was
3 a terrible deal for us. I hate to make that confession, but
4 it shows how forthright we are.

5 One other thing, Commissioner, there isn't all
6 that much difference when you look at public broadcasting
7 production costs. After all, WGBH, the great producer,
8 along with WNET have their systems. When you look at what
9 they produce, it's mostly a matter of transportation. They
10 bring films over from England. They don't produce them.
11 They buy the rights through Time-Life, that's an agent for
12 BBC.

13 May I say, once again, I think the additional
14 25 percent slash of Commissioner Garcia is unfair,
15 Commissioner Coulter, and I hope you'll talk her out of it.

16 (General laughter.)

17 COMMISSIONER COULTER: Mr. Aleinikoff, you men-
18 tioned in your statement that you felt that the sums alluded
19 to or mentioned in both proposals by both Commissioner Burg
20 and Commissioner Garcia exceeded somewhat your highest
21 estimate.

22 Just speaking personally -- obviously, nothing
23 has been nailed down yet -- and this is a continuing reflec-
24 tion I made during, I believe, the May 4th meeting, of the
25 uniqueness of the role of public broadcasting and at least

1 my personal desire to maintain that purpose and that role
2 and its independence from ratings, is that isn't it con-
3 ceivably in the long term interest of Public Broadcasting to
4 encourage composition in precisely the areas that you are
5 producing and trying to broadcast in, and if your long role
6 is the dissemination of a different form of culture program-
7 ming, is that not perhaps included in your interest?

8 It's not a question. I know that we are talking
9 about a different subject here, but I think that it's a
10 relevant observation.

11 MR. ALEINIKOFF: I think it's very much involved,
12 and I think it's very pertinent. You are perfectly right.
13 It's to our advantage to encourage creativity in the music
14 field, the art field and everything else. It is one of our
15 missions. It's not just our mission to produce programs
16 for broadcasting. We'd also like to encourage what goes into
17 those programs, script writers, and actors, and performers,
18 and the academics, and the committees, and all the other
19 people that make our network what it is. And the more we
20 can encourage that, the better off we are.

21 Our feeling is -- and this, now, gets back to
22 something that we haven't talked about in a long time is
23 music use. We have said over and over as far as the ASCAP
24 music that is used on our air, as distinguished from
25 commercial radio, certainly, and probably commercial

1 television, we find most of that in those children programs.
2 And in those children programs our producers, whether it's
3 an independent CTW or a station employs the composer, hires
4 the composer, pays the composer to write that music for the
5 program.

6 And to answer your question, absolutely, I think
7 that Joe Raposo may not be the only element in the program,
8 but he's a strong element, and he should get paid what it
9 takes to encourage him to compose for Sesame Street, and
10 that's true for Mr. Rogers in Mr. Rogers Neighborhood, and
11 for all the other children's programs.

12 Our only point is what are we paying for? Are we
13 paying to encourage the author, because we would like to
14 encourage that directly, or are we paying for the use of
15 copyrighted music which has very little connection with our
16 usefulness in most cases.

17 That's what we've been trying to say over and
18 over. We do believe that we should pay for that, and that
19 is why I'm saying -- but, remember, that what you're talking
20 about now is not the entire music fraternity, or all of the
21 composers, or even half of the composers. You're talking
22 about a performing rights licensing organization that's
23 licensing certain kinds of music. And the rights they are
24 licensing are the same rights -- not the same rights, they
25 are other rights for the same music for which other kinds

1 of payments may well be more appropriate to reach not only
2 our broadcasting end, but the end of rewarding and
3 encouraging the composer to compose.

4 There are other kinds of things, too, whether it's
5 the record payments that are paid that are per record, and
6 not necessarily per the income of the record company.
7 There are other ways of doing it, and we have always felt
8 very strongly about that.

9 May I comment on just one or two things, just a
10 couple of details?

11 This whole business of -- again, I'd like to
12 repeat, on the commercial television side, whether you are
13 talking about the flat interim arrangement that's been going
14 on for a number of years for the networks or for the
15 stations, and the inter-relationship of the network license
16 to the station license, what you're paying for.

17 I have always understood those to be two different
18 kinds of non-overlapping licenses. Maybe I'm wrong. Maybe
19 they intend that you duplicate and charge a license to the
20 network for the same programs that the station charges, but
21 I doubt it. This one maybe we ought to clear up sometime.

22 As far as the numbers are concerned, all I can say
23 is that on the simplistic look that I have given it, when
24 you talk about a 15 percent deduction for a sales commis-
25 sion, and another 15 percent deduction for an agency

1 commission, and another 15 percent deduction for some other
2 expenses, the number, the effective rate number varies from
3 station to station, as far as I know. In some stations it
4 goes very low because it's a special deal either with BMI or
5 ASCAP. In other stations it goes very high.

6 So that when we say that there is a definite
7 thing here, I think ASCAP tried to find what the effective
8 rate by putting them all together and taking an overall per-
9 centage. I just don't happen to think that that works for
10 Public Broadcasting on a comparative basis.

11 On the reduction, as far as CTW is concerned, I
12 must say I am now wondering about what anybody is talking
13 about, about whether CTW is included or excluded, because I
14 didn't say I don't think that -- all I'm trying to say is,
15 to the extent that the money for CTW production goes through
16 a station budget, it should be included in your theory.
17 To the extent that it doesn't go through a station budget,
18 it would seem to me to be inappropriate to include it.

19 I am not sure, again, unless we go into the back-
20 ground on how each year is financed, which comes through
21 stations and which doesn't. That's all I'm trying to say
22 about it.

23 CHAIRMAN BRENNAN: Thank you, Mr. Aleinikoff. I
24 thank Counsel for their contribution.

25 Commissioner Burg?

1 COMMISSIONER BURG: I have nothing.

2 CHAIRMAN BRENNAN: The Chair has proved to be a
3 bad prophet. I had indicated earlier that I thought that
4 we could complete the agenda by mid-day. We obviously can-
5 not. We will recess until 2:00 p.m.

6 (Whereupon, at 12:10 p.m., a luncheon recess was
7 taken, to reconvene at 2:00 p.m. the same day.)
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A F T E R N O O N . S E S S I O N

(2:00 p.m.)

1
2
3 CHAIRMAN BRENNAN: The meeting will resume. I give
4 the floor to Commissioner Burg.

5 COMMISSIONER BURG: Thank you, Mr. Chairman. Let
6 me say that -- at least speaking for myself, and, I think,
7 for other commissioners -- that these proceedings have not
8 been easy for us in many respects. It's been a very, very
9 difficult assignment and, in fact, I suppose it was almost
10 fore-ordained that it would be that way because both parties
11 to these proceedings were so far apart initially in what one
12 party demanded and what the other party offered, that there
13 simply was no common ground for us to proceed from.

14 And it was clear, also, at the outset that with all
15 the manpower, the womanpower, and the energies, and the
16 thoughts, and the proposals, and the counter proposals that
17 were applied to the question, there was no irrefutable, no
18 incontestable, no clarion formula, no formula or schedule
19 emerged that had a ring of inevitability about it.

20 This Tribunal and these Commissioners approached
21 the problem in good faith, and they grappled with it with a
22 high degree of responsibility.

23 We all are aware of the ramifications, and we're
24 all aware, really, of our responsibilities. We know, further
25 that whatever is decided here today is not going to satisfy

1 both parties uniformly, nor, for that matter, will it satisfy
2 the five commissioners equally.

3 Now, having said that I am going to again propose
4 officially my population formula because it seems to me for
5 this initial five-year period it is the cleanest, the least
6 contestable, and the simplest.

7 Furthermore, I think it gives fair value to the
8 copyright owners, and it is a reasonable reflection of use.

9 I am not saying that it is without flaws or
10 deficiencies, but I feel it is more manageable.

11 With regard, Mr. Korman, to the Canadian system,
12 we did check into it, and it became obvious to us that there
13 were some apples and oranges situation, so, we could not
14 apply it the same way; it was not meant to give you less than
15 a percentage than they were getting, but that was not the
16 full, true story.

17 Mr. Aleinikoff, with regard to the ratio between
18 radio and television, I was very much aware of that and,
19 indeed, changed that ratio figure at least once, and possibly
20 twice.

21 I could not in good conscience change it again be-
22 cause I was afraid it would go off the graph completely if I
23 did.

24 I thought that perhaps it was fair because of the
25 small base it was attached to, but, obviously, that is a

1 problem, and I was aware of it.

2 My formula, in terms of the dollars produced, re-
3 sults in, obviously, more than what one party wanted to pay
4 and less than what another party wanted.

5 But it seems to me that we're looking down a long,
6 long road here, and we're taking but the first step in that
7 journey.

8 The framers of this legislation wisely, I think,
9 provided for five-year review periods, and in 1982 all of us
10 -- you out there, and the five of us here at this table --
11 will be the beneficiaries, really, of additional experience
12 and information with regard to this.

13 We aren't setting something today that will apply
14 uniformly in perpetuity, forever and ever. We're talking
15 about one five-year period, and whatever we decide here
16 today can be modified, it can be changed, it will be re-
17 viewed, it can be completely rewritten, for that matter, if
18 necessary, in 1982.

19 For now my plan will be based on base figures that
20 can be established by an outside neutral party. This formula
21 will reflect future growth.

22 Just to give you an idea of my starting point, I
23 computed a half a cent on the 172.4 million. If that base
24 figure turns out to be 182.4 million, it will produce
25 912 thousand compared to 862 thousand.

1 If that base figure turns out to be 190 million,
2 it will produce \$950,000 compared to \$862,000. So, there is
3 a growth factor in it. It is a national figure which, if
4 desired, can be prorated to individual stations. It is a
5 figure that can easily have an inflationary index attached
6 to it. And it is a process, I believe, that is valid and
7 for which there is precedent.

8 Therefore, Mr. Chairman, I am putting on the table
9 my market population formula. Thank you.

10 CHAIRMAN BRENNAN: The Chair interprets the
11 Commissioner's request as a motion that we agree in principle
12 to Commissioner Burg's market population proposal.

13 Is there any discussion on Commissioner Burg's
14 motion?

15 (No response.)

16 CHAIRMAN BRENNAN: Is there further discussion on
17 the motion?

18 (No response.)

19 CHAIRMAN BRENNAN: If not, we will proceed to a
20 vote on the motion. A "yea" vote is to approve in principle
21 the market population proposal of Commissioner Burg.
22 Obviously, a "nay" vote is the converse.

23 In accordance with the temporary rules, the votes
24 of the Commissioners shall be recorded separately. We shall
25 now proceed to the vote.

1 Commissioner Coulter?

2 COMMISSIONER COULTER: Yes.

3 CHAIRMAN BRENNAN: Commissioner Burg?

4 COMMISSIONER BURG: Yes.

5 CHAIRMAN BRENNAN: Commissioner James?

6 COMMISSIONER JAMES: No.

7 CHAIRMAN BRENNAN: Commissioner Garcia?

8 COMMISSIONER GARCIA: No.

9 CHAIRMAN BRENNAN: The Chair votes no.

10 On this vote the "ayes" are two, the "nays" are
11 three. The motion is not approved.

12 Does the Chair hear a motion?

13 COMMISSIONER GARCIA: Mr. Chairman?

14 CHAIRMAN BRENNAN: Commissioner Garcia?

15 COMMISSIONER GARCIA: At this time I propose that
16 the revenue method in principle be adopted by the Tribunal.

17 CHAIRMAN BRENNAN: The pending business is the
18 motion of Commissioner Garcia that we adopt in principle
19 Commissioner Garcia's revenue formula. Is there any dis-
20 cussion on the motion? Commissioner Coulter?

21 COMMISSIONER COULTER: I have just one observa-
22 tion, question, I'd like to address to Mr. Aleinikoff before
23 proposing an alternative motion which, I guess, could be
24 interpreted as a variation of the one proposed by Commissioner
25 Garcia, and that's that these whole proceedings are caused,

1 in essence, because of the unique nature of public broad-
2 casting.

3 And in Commissioner Garcia's proposal there's a
4 deduction of the production cost or revenue -- which pre-
5 sumably are equivalent -- rather, production cost, before
6 applying her rates.

7 My question -- and I was trying to somehow focus on
8 this in speaking with Mr. Korman earlier this morning -- my
9 question is, why is production cost, or why are production
10 costs particularly unique to public broadcasting?

11 I could see in many other areas public broadcasting
12 is unique, its funding, et cetera, but the production cost
13 per se to me don't seem to possess any uniqueness any
14 different than, say, CBS or any of the local stations Mr.
15 Korman alluded to.

16 And before presenting what I consider an alterna-
17 tive proposal, I'd like to ask you why they should be con-
18 sidered in a different light from commercial television.

19 MR. ALEINIKOFF: Well, let me say two things. When
20 you say, "are they unique", you need the same components to
21 produce a television program, generally, if you have talent,
22 if you have music, and if you have sets, cameras, and all the
23 rest of it. You obviously use the same kind of equipment.

24 There are different kinds of people. You can find
25 different kinds of talents on public broadcasting programs

1 that you don't find on commercial television, different
2 caliber of people and different kinds of people.

3 As far as what kind of production there is, it's
4 very hard to compare producing All In The Family with the
5 stage drama; it's a different kind of production technique
6 for the weekly half hour or one hour film, or even taped
7 programs, than there is for most public broadcasting kinds
8 of productions, if you try to think of what kinds of pro-
9 grams there are on public broadcasting air.

10 Now, as far as whether it's a panel program on an
11 intellectual problem or a panel program on a game show, I
12 think there are differences, certainly, in dollar amounts.

13 There's no question about commercial budgets being
14 two, three, four times what public broadcasting budgets are.
15 Whether the availability of funds or the treatment of the
16 subject matter is what's involved, I'm not sure. I suppose
17 if we were doing a play to the utmost and had other funds
18 available, we would do the play as well on public broad-
19 casting as we can.

20 There is one difference. Although there has been
21 allusion to salaries paid both high and low in public
22 broadcasting, certainly the same star system does not exist;
23 nobody gets paid a million dollars to do a program, and you
24 can get paid a million dollars if you're doing a Hollywood
25 film. The same thing goes for script writers.

1 When you're talking about top-notch production in
2 Hollywood or New York, you're talking about dollars that are
3 so different that probably there's a difference in qualities
4 and also a difference in amounts.

5 Now, having said all of that about what the
6 differences are in production, I really would like to point
7 out just once again, there is a difference in how music is
8 used in production, as far as we are concerned.

9 Music for All In The Family is background music
10 composed for that piece, or it's popular music that's sung
11 in a revue or in a variety format or a comedy format.

12 There is very little of that, either of that kind
13 of programming on public broadcasting. The music is back-
14 ground music for documentary films. It's primarily centered
15 in children's programs, with special music for children.
16 To that extent, there's a difference in the production
17 technique that produce the music.

18 In some cases it's recorded specially. When you
19 come to radio, it's playing records. Now, is there a
20 difference between playing a Beethoven symphony or playing a
21 lot of pop? One of the differences is the amount of music
22 that you use that's copyrighted, and that's within the domain
23 of the performing rights societies.

24 To that extent, we feel there is a difference in
25 terms of the use of music and the programs, if that's what

1 you were getting at, unless there's something that I have
2 missed.

3 COMMISSIONER GARCIA: Mr. Chairman?

4 COMMISSIONER COULTER: I was just going to go on
5 to another --

6 COMMISSIONER GARCIA: Were you going to ask another
7 question of Mr. Aleinikoff?

8 CHAIRMAN BRENNAN: Yes.

9 COMMISSIONER GARCIA: Okay, I'm sorry.

10 COMMISSIONER COULTER: No, if you want to ask some-
11 thing--

12 COMMISSIONER GARCIA: Commissioner Coulter, if I
13 understood your question correctly about production, the
14 only reason that was mentioned today -- and I feel that it's
15 something that has been blown out of proportion -- is because,
16 if you could remember correctly, at the hearings, ASCAP, when
17 they originally computed their figure, they computed on the
18 \$412-million, which was 361.4, and then the 50.7 television
19 and radio respectively, okay?

20 COMMISSIONER COULTER: Right.

21 COMMISSIONER GARCIA: And a lot was made to do
22 about the fact that that was a CPB consolidated figure. It
23 includes all their entities.

24 COMMISSIONER COULTER: Uh-huh.

25 COMMISSIONER GARCIA: Some of those entities are

1 definitely entities that are not transmitted entities at all,
2 and we probably, in my opinion, do not have any jurisdiction
3 over those entities.

4 One of them -- and I brought this one up because
5 this was the one that reappeared over and over in the trans-
6 cript -- was the Children's Television Workshop. And the
7 only reason that was brought up is those kind of income are
8 not going to be subjected to royalty fees. Okay?

9 COMMISSIONER COULTER: Okay, but I guess my concern
10 is that if you're applying a revenue formula and the purpose
11 behind that is to -- you have some formula comparative with
12 what takes place in the commercial world, that in the -- in
13 commercial broadcasting production, Mr. Korman itemized a few
14 examples where it was treated somewhat differently, but my
15 impression, generally, is that production isn't isolated as
16 such on a general basis, and I'm sure that commercial sta-
17 tions must have parts of their companies that produce and
18 don't transmit, and that I don't understand that why the fact
19 that public broadcasting has that, why that is particularly
20 unique to public broadcasting, as opposed to commercial
21 broadcasting, unlike the areas of their income.

22 And that's the focus of my questioning. Is that --

23 CHAIRMAN BRENNAN: I think, Commissioner, if the
24 Commissioner will yield, I think Mr. Aleinikoff would like
25 to clarify this point.

1 MR. ALEINIKOFF: Let me just try and say one thing
2 about this point in an effort to be helpful. In the commer-
3 cial side, the funds that go into programming are paid either
4 by national advertisers, basically, or local advertisers.

5 If it's a national network program, the national
6 advertisers on that program pay for the cost, pay for the air
7 time, which is much more expensive than --

8 COMMISSIONER COULTER: Now you're addressing your-
9 self, though, to the source of the income, which is different.

10 MR. ALEINIKOFF: No, what I'm really trying to say
11 is in terms of the production, the income that is applied to
12 that is allocated to the station on the station's share.
13 Maybe I am. What I'm really trying to say is that on the
14 local station, the local station has advertisers, the ad-
15 vertisers pay for a share of local programming cost. It
16 doesn't pay for the national cost.

17 So, when you use such a percentage of the income
18 of the station, you're measuring that a little bit different-
19 ly than when you talk about the production cost for public
20 broadcasting programs, because those costs, as I said before,
21 either comes from grants or gifts or federal money or the
22 station's own resources.

23 COMMISSIONER COULTER: But if I may observe, that,
24 again, is the nature of the source of the money, which I
25 acknowledge is substantially different. It's not saying that

1 the production itself is by its nature substantially
2 different from commercial.

3 MR. ALEINIKOFF: As I said before, I think the
4 production is different in degree in terms of the budgets
5 that are available for it, in terms of the kind of rights
6 that go into union agreements and use of the programs, and
7 in terms of the use of music on the production. We've always
8 felt that that was substantial enough.

9 CHAIRMAN BRENNAN: If Commissioner Garcia will
10 further yield, I think Mr. Korman would like to respond.

11 MR. KORMAN: If I may, Mr. Chairman.

12 It occurs to me there are certain areas where there
13 are very close similarities between the commercial and the
14 public world. The Dick Cavett Show is an example. I don't
15 think there is very much difference between the manner in
16 which the Cavett Show is produced as a public broadcasting
17 show and what it was on ABC.

18 I was talking the other day to two ASCAP board
19 members who taped the Cavett Show which will be shown in
20 June, unfortunately after this Tribunal's decision is to be
21 rendered, and I don't know if I can agree with Mr.
22 Aleinikoff about the question of whether there's any star
23 compensation paid to Cavett.

24 I recall there was some testimony as to what Cavett
25 gets, and to my mind it is in the star category. I don't

1 remember the exact level, but it was a lot of money.

2 CHAIRMAN BRENNAN: The figure of \$200,000 has been
3 mentioned; is that --

4 MR. KORMAN: Yes, that comes to my mind, too.

5 Now, there is this difference, I think. What is
6 produced in public broadcasting, the expense incurred in
7 public broadcasting production relates to programs and promos
8 -- promotional announcements -- that are shown on public
9 broadcasting.

10 What is often produced by a local production center
11 in commercial television, and it used to be before the
12 Department of Justice looked at the networks' activities,
13 that if you wanted to be a network sponsor you had to use the
14 network's facilities to produce your spots.

15 Now that's changed. The networks gave that up,
16 and now there are a few Metromedia, Westinghouse, and there
17 are a number of large production centers that produce
18 commercials.

19 Very often Metromedia will produce a Montgomery
20 Ward, for example, announcement that may not be broadcast
21 on any Metromedia station. Metromedia earns money providing
22 production facilities to Montgomery Ward, or, more accurately,
23 its advertising agency, and those spots will be shown all
24 over the country, maybe as network spots, maybe as local
25 spots, but not on Metromedia, or perhaps on Metromedia as

1 well as other stations. Those spots are expensive to pro-
2 duce,

3 The question came up is it fair to include that
4 revenue in the base on which the ASCAP fee is to be computed
5 by Metromedia. And the solution reached by negotiation was,
6 yes, it is fair if the announcements are shown on Metromedia
7 because if you didn't include it you could get all kinds of
8 shifts -- Metromedia might give the time away virtually free
9 in order to make the sale of the production facilities to
10 make the announcement -- but, no, if the announcement is not
11 shown by a Metromedia station.

12 So, there is this difference. There's a certain
13 amount of production business that goes on in the commercial
14 world by commercial broadcasters where the announcements
15 that result are not shown by the station that produced them,
16 or it's affiliated production companies.

17 I think -- I'm not absolutely certain, but I'm
18 reasonably certain -- that in the public broadcasting world
19 whatever is spent to produce a program or promotional
20 announcement is in fact used for public broadcasting of that
21 announcement.

22 COMMISSIONER COULTER: Mr. Aleinikoff, I just
23 wanted to voice my feeling on that. This is in preface to a
24 proposal which I thought might be a compromise and a way to
25 resolve the differences that you both have on the two

1 counter proposals, and that was this, is that there be simply
2 a fee per dollar revenue, and that that accommodate ASCAP in
3 that it is based on revenue, but that it also accommodate
4 Public Broadcasting in that it being a formula unique to
5 Public Broadcasting acknowledges as such the uniqueness of
6 public broadcasting, and it would also have a certain virtue
7 of simplicity. It would avoid the arguments of what to
8 deduct. It could be easily allocated per entity or station,
9 and it would automatically -- and this was your concern
10 earlier -- it would automatically take care of inflation and
11 any growth.

12 I offer that as an alternative. It's a revision
13 slightly of the revenue formula, and I think it's a
14 simplified version, and it doesn't get into this confusion
15 of productions and other subjects.

16 And it would be simply a fraction of a cent per
17 dollar of total public broadcasting revenue.

18 CHAIRMAN BRENNAN: I would again -- do you want
19 to --

20 COMMISSIONER GARCIA: I was just going to ask
21 Commissioner Coulter something.

22 CHAIRMAN BRENNAN: Yes, please do.

23 COMMISSIONER GARCIA: In your proposal, Commissioner
24 Coulter, are you talking about the entire CPB, as opposed to
25 identifying that as public broadcasting?

1 COMMISSIONER COULTER: Well --

2 COMMISSIONER GARCIA: You're talking about the
3 \$412-million?

4 COMMISSIONER COULTER: Yes, exactly. Yes.

5 COMMISSIONER GARCIA: Okay.

6 COMMISSIONER COULTER: Okay, just in working up
7 something that somewhere in between the figures that were
8 mentioned this morning, if you assigned three-tenths of a
9 cent to gross -- to Public Broadcasting revenues, that might
10 be a starting figure.

11 CHAIRMAN BRENNAN: I think the Chair ought to
12 extend the parties, again, the opportunity to comment on
13 this new proposal. We will recess for five minutes.

14 (A short recess was taken.)

15 CHAIRMAN BRENNAN: The meeting will resume. Mr.
16 Korman, do you wish to comment on the Commissioner's proposal?

17 MR. KORMAN: Thank you, Mr. Chairman.

18 I think Commissioner Coulter's approach has certain
19 very attractive features. First, it starts with a top
20 revenue number, and that's a number that's readily verifiable
21 and easy to deal with, and if we and the Public Broadcasters
22 had sat down and worked something out voluntarily on that
23 basis, I think that might have been the simplest solution
24 for everybody concerned. Unfortunately, we were not able to
25 do that.

T3,SB

17

1 I am concerned that this approach, while perhaps
2 satisfactory for the parties to arrive at voluntarily,
3 probably does not square with the statute. I think that it
4 is necessary, as I read the statute, to draw certain dis-
5 tinctions, at least, and I think that Commissioner Garcia's
6 proposal does.

7 It distinguishes between radio and television, and
8 it distinguishes or provides a basis for distinguishing
9 among the individual broadcasting and performing entities.

10 I am concerned, frankly, that the Public Broad-
11 casters could be successful in a court attack on the proposal,
12 or, rather, on rates and terms promulgated by this Tribunal,
13 which would base the fee on the revenues of an organization
14 like CTW, and I think Mr. Smith mentioned that there may
15 indeed be other organizations which produce exclusively for
16 public broadcasting, which are not on the list to which we
17 referred earlier, and I'm not quite sure what they are, or
18 how they would figure in.

19 It seems to me that, as I indicated earlier this
20 morning, we're not happy with the second slice that
21 Commissioner Garcia would take out of the kinds of composers,
22 her approach is sounder, and I say that with some regret
23 because I recognize that Commissioner Coulter's would be a
24 lot easier to deal with, and I am concerned about the
25 possibility of there being disputes in the future. We don't

1 want to have to argue with the Public Broadcasters about
2 what belongs in and what does not belong in the base.

3 And Mr. Aleinikoff I'm sure will agree with me
4 that he and I have an almost perfect record of misunderstand-
5 ing and disagreement, and I am very much concerned that we
6 not have some arrangement here that is anything but crystal
7 clear so that neither side will dare submit it to an impartial
8 third party if a dispute turns up by virtue of taking an
9 unreasonable position.

10 So, I would say that I like the approach that the
11 Commissioner suggested, but I'm afraid that as I view the
12 statute it doesn't apply.

13 CHAIRMAN BRENNAN: Thank you, Mr. Aleinikoff?

14 MR. ALEINIKOFF: I'm sorry to disagree with Mr.
15 Korman.

16 (General laughter.)

17 MR. ALEINIKOFF: I really am. I have not felt that
18 our difficulties of the past have been due to misunderstand-
19 ings or lack of understanding. I thought we understood each
20 other all too well, and that's what has made things perhaps
21 as difficult to reconcile between the two groups as it was.
22 Perhaps if we had misunderstood each other we could have
23 reached an imperfect reconciliation. I don't think that
24 would have helped any of us.

25 I think that in general -- to answer you,

1 Commissioner Coulter, I don't think that it would be
2 advisable for Public Broadcasting to go with your proposal
3 either.

4 MR. KORMAN: Would you speak a little louder?

5 MR. ALEINIKOFF: We have the same doubts about the
6 proposal in terms of duplication, in terms of outside organi-
7 zations, in terms of problems in reaching funds and reaching
8 organizations that probably should not be reached and should
9 not be included. This is a simpler kind of thing to do,
10 and we recognize that. It would be easier for us to apply
11 it. It takes into consideration that we are a single national
12 network, and we understand that.

13 We just don't think that this probably would work
14 as well for us.

15 I would like to say two things now that you've
16 had at least one vote, so it's awfully clear where Public
17 Broadcasting does stand.

18 On the procedural side, Commissioner Garcia, we do
19 -- and we have discussed this -- have some problems with your
20 proposal in terms of time lapse. We're not clear how long it
21 takes for us to amass the data that's necessary to apply it
22 for one year. When we get done with a fiscal year and the
23 auditing of reports, and then the circulation of reports,
24 and centralization, it may be you're a year behind in your
25 payments rather than the year that it will take to get all

1 that data in.

2 But I assume that you and we, or somebody and we
3 could get together because you both would like to reach what-
4 ever it is as quickly as possible. So, I just wanted to
5 throw this out as a caveat that we may not be able to get
6 those reports in as quickly as you think might be possible.
7 But I think that we could solve that.

8 The second thing is, I do want to repeat here what
9 perhaps we have not said before, that Public Broadcasting
10 is opposed to a formula based upon overall gross revenue of
11 the system.

12 We don't think it's appropriate. We don't think
13 it's right. We don't think it's a good idea. We think it's
14 almost an unfair way of treating Public Broadcasting.

15 We think those dollars are different from commer-
16 cial dollars. There's no way in which I can appear before
17 you and endorse a concept of that kind. It's just beyond
18 anything that we feel is possible or right,

19 As far as the solution of a percentage of gross
20 revenue is concerned, whether -- what I'm really reaching
21 for is to say that it seems to me that it would be appro-
22 priate if the Tribunal wants to, rather than to set a sliding
23 scale based upon a percentage.

24 And since this is a five-year period, or a four-and
25 a-half-year period, perhaps there's a better way of doing it,

1 which is by reaching for something that I understood the
2 Tribunal at the last meeting not to prohibit, and that is a
3 flat fee based upon this calculation; in other words, use
4 whatever calculation you want to reach the fee that you want,
5 and then for the simplicity purposes that we're looking for,
6 establish that fee with whatever gradations you want for the
7 next five-year period, as a lump sum. Then there can be no
8 disagreements. That's the fee, and that's fixed for the
9 five years, and the next five years you can do -- or, your
10 successors can do anything they desire after that.

11 But rather than get into the kind of problems
12 that Mr. Korman was referring to each year, and the kind of
13 problems that Mr. Brennan was referring to about what's
14 included and what's excluded, that might be an easier way to
15 come up with a rate.

16 CHAIRMAN BRENNAN: Thank you, Mr. Aleinikoff,
17 Commissioner James?

18 COMMISSIONER JAMES: I pass again.

19 COMMISSIONER BURG: Mr. Chairman?

20 CHAIRMAN BRENNAN: Commissioner Burg?

21 COMMISSIONER BURG: In view of the rather unsettled
22 aspects of these formulas right now, I'm going to make a
23 motion to defer action on either Mr. Coulter's amendment or
24 Commissioner Garcia's proposal until June sixth. I so move.

25 CHAIRMAN BRENNAN: Commissioner Burg has made a

1 motion to postpone to a time and date certain. We have not
2 adopted any permanent rules of procedure, and I trust the
3 Commissioner will indulge her colleagues in allowing the
4 Chairman to debate the motion even though perhaps it might be
5 an undebatable motion.

6 Does any Commissioner wish to speak on Commissioner
7 Burg's motion?

8 COMMISSIONER JAMES: Yes, I do.

9 CHAIRMAN BRENNAN: Commissioner James?

10 COMMISSIONER JAMES: I am opposed to it. I think
11 we have been wrestling with this since the early part of
12 this year. June the sixth is pushing us right to the dead-
13 line, I think we have enough information. There's been
14 enough dialogue for us to make the decision because we have
15 some writing to do. And to delay it until that last day
16 puts a tremendous burden on the person who is going to have
17 to draft these regs, and I think we need to know now because
18 we're only a week away from the final determination.

19 I think we have sufficient information to have a
20 vote.

21 CHAIRMAN BRENNAN: I move to amend Commissioner
22 Burg's motion to delay further consideration until 10:00
23 a. m., Monday next.

24 Commissioner Garcia?

25 COMMISSIONER GARCIA: That's the fifth?

1 CHAIRMAN BRENNAN: The fifth.

2 Commissioner Burg accepts the amendment, and the
3 pending business now is the amended motion of Commissioner
4 Burg. Is there further discussion?

5 (No response.)

6 CHAIRMAN BRENNAN: If not, we shall vote on the
7 motion. A "yea" vote is a vote to postpone further considera-
8 tion of this particular item until 10:00 a.m., Monday, June
9 fifth. A "nay" vote, obviously, is to continue the pro-
10 ceedings at the present time.

11 Commissioner Coulter?

12 COMMISSIONER COULTER: No.

13 CHAIRMAN BRENNAN: Commissioner Burg?

14 COMMISSIONER BURG: Yes.

15 CHAIRMAN BRENNAN: Commissioner James?

16 COMMISSIONER JAMES: No.

17 CHAIRMAN BRENNAN: Commissioner Garcia?

18 COMMISSIONER GARCIA: No.

19 CHAIRMAN BRENNAN: The Chairman voted aye.

20 On this vote, the ayes are two, the nays are
21 three. The motion is defeated. We continue with considera-
22 tion of the pending business. Commissioner Garcia?

23 COMMISSIONER GARCIA: Mr. Chairman, at this time
24 I'm open for questions from any of the other Commissioners
25 as to what some of their problems are. I think the problem

1 that's creating the most confusion is what the transmitting
2 entities are and the production entities. I'd like to just
3 -- I think we've heard both ASCAP's and PBS' interpretation
4 of this, and I would like to give all the consideration to
5 each one of the Commissioners that they in their own mind
6 can have the exact entities that we're speaking about.

7 And in lieu of your amendment, I will be happy to,
8 tomorrow or Friday, to sit down with representation from
9 both ASCAP and Public Broadcasting so that we can, to the
10 satisfaction of all the Commissioners, identify what a
11 transmitting entity is.

12 COMMISSIONER JAMES: Mr. Chairman, a procedural
13 question.

14 CHAIRMAN BRENNAN: The Chair recognizes Commissioner
15 James on a point of order.

16 COMMISSIONER JAMES: We have a basic motion before
17 us, Commissioner Garcia's revenue -- her formula based on
18 revenue as a concept.

19 My question is, where does Commissioner Coulter's
20 motion stand?

21 CHAIRMAN BRENNAN: Commissioner Coulter, if he so
22 desires, may offer a substitute for the motion of Commissioner
23 Garcia, in which case the initial vote will occur on the
24 substitute.

25 If the motion is defeated, we then continue with

1 consideration of Commissioner Garcia's proposal,

2 COMMISSIONER JAMES: Then, I'd like to move that
3 we consider Commissioner Coulter's substitute motion at this
4 time.

5 COMMISSIONER COULTER: I will withdraw the substi-
6 tute.

7 CHAIRMAN BRENNAN: Commissioner Coulter has with-
8 drawn the substitute. Question recurs now on the motion of
9 Commissioner Garcia.

10 The Chair thinks that Commissioner Garcia has made
11 a very constructive suggestion in undertaking to clarify
12 some of the terminology in her proposal.

13 This Commissioner, earlier in the proceedings,
14 indicated that he was disposed to support a revenue-based
15 formula.

16 Unlike some of my colleagues, I have no difficulty
17 philosophically with a revenue-based formula. And in terms
18 of the foreign experience, I believe a revenue formula is
19 more appropriate than other proposals advanced in this pro-
20 ceeding.

21 It was for that reason that I voted against the
22 motion of Commissioner Burg because my disposition is toward
23 a revenue-based formula.

24 However, I also indicated to Commissioner Garcia
25 that I had concerns about the terminology of her proposal

1 and, unfortunately, the proceedings this morning have not
2 satisfied those concerns. Consequently, at this time I could
3 not vote in favor of Commissioner Garcia's proposal, but I am
4 hopeful that by following the course which she has suggested
5 these problems can be clarified and it will be possible for
6 me ultimately to vote for the Commissioner's proposal.

7 I regret that we are unable to defer consideration
8 of this item until next week. There is an option which is
9 open to the Commissioner. A Commissioner who is on the pre-
10 vailing side can move to reconsider a previous vote and if
11 the Commissioner were so disposed, she could move to re-
12 consider the vote to postpone this until next Monday, which
13 would then allow the opportunity to undertake these dis-
14 cussions.

15 COMMISSIONER GARCIA: Mr. Chairman,

16 COMMISSIONER JAMES: Question, Mr. Chairman.

17 Again I'm a little confused. Is the motion to accept
18 Commissioner Garcia's --

19 CHAIRMAN BRENNAN: The pending motion is a motion
20 to adopt the proposal of Commissioner Garcia.

21 COMMISSIONER JAMES: In principle.

22 CHAIRMAN BRENNAN: In principle.

23 COMMISSIONER JAMES: This is a revenue-based
24 formula, not all the details.

25 CHAIRMAN BRENNAN: The language, Commissioner, is

1 CHAIRMAN BRENNAN: The Chair understands that the
2 pending question is to agree in principle to a revenue-based
3 formula, without voting on the specific details of any such
4 formula.

5 Has the Chair correctly stated the motion?

6 COMMISSIONER GARCIA: Yes, Mr. Chairman.

7 CHAIRMAN BRENNAN: Is there any debate on the
8 motion?

9 (No response.)

10 CHAIRMAN BRENNAN: We shall proceed to the vote.
11 Commissioner Coulter?

12 COMMISSIONER COULTER: I abstain.

13 CHAIRMAN BRENNAN: Commissioner Burg?

14 COMMISSIONER BURG: No.

15 CHAIRMAN BRENNAN: Commissioner James?

16 COMMISSIONER JAMES: Yes.

17 CHAIRMAN BRENNAN: Commissioner Garcia?

18 COMMISSIONER GARCIA: Yes.

19 CHAIRMAN BRENNAN: The Chair votes aye.

20 On this vote the "ayes" are three, the "nays" one,
21 one Commissioner not voting. I take it, then, we now agree
22 to postpone further consideration of this item until June the
23 fifth. So agreed.

24 The item which is somewhat divorced from the
25 royalty payment is the matter of reports of uses of musical

1 similar in form to what we have followed on all the other
2 issues, whereby we are reserving any formal, final action
3 until June the 6th, but certainly a vote "yea" on Commis-
4 sioner Garcia's proposal is an affirmative vote on the text
5 which is currently before us which, at least I find to be
6 not fully satisfactory.

7 COMMISSIONER JAMES: Well, that's my confusion.
8 If we're adopting something in principle or adopting the
9 text, then I think I share your concern. But if the motion
10 is to adopt something in principle, and then subsequently to
11 refine all the integral parts of that proposal for a final
12 determination on the sixth, then that's another matter.

13 CHAIRMAN BRENNAN: If the pending motion was to
14 agree in principle to a revenue-based formula period, this
15 Commissioner can vote for that proposal.

16 COMMISSIONER GARCIA: Mr. Chairman, without having
17 to call back the record, my initial motion was that we con-
18 sider this revenue-based formula in principle. Now, does
19 that take care of this?

20 What my main concern is with postponing this,
21 that's why I said to you that I would be happy to get together
22 with the two parties and, maybe to the Commission satisfactory,
23 maybe we can come to a meeting of the minds as to what we are
24 talking about transmitting entities. I mean, I know what I'm
25 talking about transmitting entities, okay?

1 But what I'm saying is that we adopt the revenue
2 method in principle. Now, the finer details, I yield to that
3 and I'm willing to wait until June the 6th for that.

4 CHAIRMAN BRENNAN: I have no problem, Commissioner,
5 in voting today "yea" in principle to accept a revenue-based
6 formula if we would leave it at that and not be necessarily
7 adopting the particular language in your draft.

8 COMMISSIONER GARCIA: Mr. Chairman, since I do not
9 feel that I have given you any particular language, I agree
10 to that.

11 CHAIRMAN BRENNAN: Is there further discussion?

12 (No response.)

13 CHAIRMAN BRENNAN: We have agreed, then, to defer
14 further consideration of this until which day, Commissioner?

15 COMMISSIONER GARCIA: June 6th.

16 CHAIRMAN BRENNAN: June --

17 COMMISSIONER GARCIA: Now you're talking about
18 the Commission?

19 CHAIRMAN BRENNAN: Yes.

20 COMMISSIONER GARCIA: Well, hold it. Maybe I mis-
21 understood you. I'm sorry.

22 COMMISSIONER BURG: When can you meet with the
23 parties and when can you give us the exact wording and text?

24 COMMISSIONER JAMES: We're getting ready to take a
25 vote on the substance of the revenue-based formula, a "yea"

1 or "nay" in principle?

2 CHAIRMAN BRENNAN: I have no objection.

3 COMMISSIONER JAMES: With the language to be worked
4 out, as all the rest of the language has to be worked out.

5 CHAIRMAN BRENNAN: Why doesn't the Commissioner
6 offer a motion along those lines?

7 COMMISSIONER JAMES: I thought Commissioner Garcia
8 had --

9 COMMISSIONER BURG: It's on the table right now.

10 COMMISSIONER JAMES: Yes, it sounds like the same
11 one that's on the table.

12 COMMISSIONER GARCIA: And that's why I'm asking you,
13 Mr. Chairman, why is it necessary that we have another meet-
14 ing before June 6th?

15 CHAIRMAN BRENNAN: Because it may require some dis-
16 cussion. It may require a second meeting after June 5th.

17 COMMISSIONER GARCIA: No, in other words, we can't
18 discuss it on June 6th?

19 COMMISSIONER BURG: What do you mean "discuss?"
20 You may run out of time. You need the additional day in
21 there.

22 COMMISSIONER GARCIA: June 5th is fine with me.

23 COMMISSIONER BURG: Let's vote.

24 COMMISSIONER GARCIA: What are we voting on?

25 COMMISSIONER BURG: I know what I'm voting on.

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1 compositions by Public Broadcasting.

2 At the May 4th meeting Commissioner James indicated
3 that he wanted this item reserved for further consideration,
4 and he made it clear that he did not agree that a consensus
5 had been reached on this question.

6 At the meeting on May the fourth a majority of the
7 Commissioners indicated general support for the record-
8 keeping provisions contained in the BMI License, namely that
9 Public Broadcasting and NPR would, on a quarterly basis,
10 furnish standard cue sheets to BMI or ASCAP, as the case
11 might be.

12 And in the BMI License Agreement, there is an
13 option extended to BMI to request selected public broad-
14 casting stations to supply music use reports for one calendar
15 week each year.

16 I believe it would be appropriate for this body to
17 follow the format of the BMI provisions. And as to the survey
18 of local stations, it would seem to me that a survey of not
19 more than 20 percent of every PBS or NPR stations in one
20 calendar year would be appropriate.

21 Commissioner James, do you wish to pursue the views
22 you expressed on this at the last meeting?

23 COMMISSIONER JAMES: Yes, I do, Mr. Chairman. I
24 would like to pursue it by asking Mr. Korman for his comments.

25 MR. KORMAN: I'm not quite clear on what that

1 means. Who would determine how much less than 20 percent?

2 CHAIRMAN BRENNAN: ASCAP.

3 MR. KORMAN: Pardon?

4 CHAIRMAN BRENNAN: ASCAP would have the option of
5 requesting in any one calendar year up to 20 percent.

6 MR. KORMAN: I think that would be fine, Mr.
7 Chairman. I'm sure we would not need more than 20 percent
8 with respect to local programs, and I would very much doubt
9 that we would ask those stations which don't otherwise keep
10 the records for anything approaching 20 percent.

11 As the Commissioners all know, there are some
12 stations that in fact publish for their listeners a fairly
13 complete listing of all the music that they broadcast for
14 radio. It would be no great burden I should think for ASCAP
15 to become a subscriber to such program listings.

16 As for those which do not keep the records, I
17 think that ASCAP's request would be along the lines of what
18 is fair and reasonable for stations, depending on their size
19 and the kind of music they play. I think we can live very
20 comfortably with such a provision.

21 And, moreover, Mr. Chairman, I think it is important
22 for the Tribunal to know that there would be every effort
23 exerted by ASCAP not to burden Public Broadcasting.

24 The Tribunal should also know that we anticipate
25 that ASCAP, because of the long history of there being many

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1 performances with no payment whatsoever, we are going to have
2 a problem with members who will be demanding that we make
3 very extensive surveys so as to compensate them. We are
4 going to have to give some considerable amount of data at the
5 cheapest possible cost, which I suggest is not taping.
6 Taping is the most expensive way of getting the data, and
7 can be avoided and reports submitted in its place.

8 CHAIRMAN BRENNAN: Mr. Aleinikoff?

9 MR. ALEINIKOFF: I really would like to say some-
10 thing, and that is when we discussed this with BMI -- and
11 the reason I'm commenting on this, you are describing this as
12 something that was negotiated with BMI. We do have some
13 informal understanding that this would be used very little
14 and would not unduly burden.

15 And I think if you will notice the language in the
16 Agreement, it says "to the extent that it's practicable
17 within the budgets of the stations."

18 BMI made it very clear that they did not feel that
19 anything very substantial would be asked for at all. I
20 think that in adopting it without that language the Tribunal
21 is going far beyond what BMI and we agreed to in terms of
22 what the burden on the local stations were.

23 CHAIRMAN BRENNAN: It's your view that it's a
24 considerable burden on a local station to keep a record of
25 the music they perform for one week out of the full year?

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1 MR. ALEINIKOFF: Let me explain what I think it
2 is, and I think you have to go back to the BMI system, which
3 is what I was going to get to why it is a burden. For the
4 programs that the stations don't produce, they have no
5 records on what music is involved in those programs.

6 For the 50 percent, 60 percent, or 70 percent of
7 the programs that come from PBS, the cue sheets are at PBS,
8 and the cue sheets have been given to them by the producing
9 stations.

10 The broadcasting stations that you are going to
11 look at have absolutely no idea what music is on there. It
12 is all guaranteed by PBS. For the programs that they produce
13 locally, I don't think it's a great burden for local programs
14 doing it a week. And there are an intermediate number of
15 programs that come from regional networks, that come from
16 abroad, that come from other places where the stations very
17 often do not have it and would probably have to go back and
18 ask for cue sheets from the supplying stations.

19 And for that purpose, yes, it is a burden in the
20 sense that it takes a great deal of administration for very
21 little accomplishment, once you have those PBS programs, as
22 well as some of the other sheets.

23 What I'm saying is we have in the past said, and
24 what I would like to suggest instead is it's no burden for
25 our stations to tape a whole day of programming. That could

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1 be done, and we'll be glad to turn those tapes over because
2 they could be done on a slow speed tape. We'll be glad to
3 turn those tapes over to any organization that wants to use
4 them for distribution purposes.

5 The only purpose of these reports that you're
6 talking about now is not for payment or anything like that.
7 The purpose is for internal distribution.

8 Now, if we were to be able to, and I'm pretty sure
9 we could, and we have offered to in the past, deliver
10 tapes, radio tapes for the whole 20 hours, or whatever it
11 is that's delivered, or for the whole television tape, you
12 can put it on one long reel for a whole day, then anybody
13 at any time can look at those tapes and decide what's on
14 them and make whatever distribution they want.

15 But for that we don't need -- all we need is one
16 machine and an engineer that puts them on and takes them off,
17 and we'll be glad to donate the tape.

18 What is hard is a person that has to sit there
19 and either listen or try and go out and get the cue sheets
20 from some place else.

21 Now, of all the institutions that probably has the
22 greatest knowledge of what's played and who owns music and
23 where music is and who does a great deal, ASCAP does a great
24 deal of listening to tapes. They've already done it to
25 several stations of ours over and over. It would seem to me

1 that they're equipped to do it a great deal more than we are
2 in an easier way.

3 CHAIRMAN BRENNAN: Does ASCAP care to respond to
4 some of these remarks?

5 MR. KORMAN: Mr. Chairman, I think that first
6 there should be a distinction drawn between radio and tele-
7 vision. In television it's my understanding that most of
8 the programs will have cue sheets readily available and it's
9 not going to be a problem. If we have the cue sheets, we
10 are not going to ask the local station to duplicate infor-
11 mation we already have.

12 Radio is a little different. I was really think-
13 ing of radio when I spoke before. That depends on the type
14 of programming the station does. WNYZ in New York for, it
15 used to be a dollar -- I don't know what it is now -- will
16 send the listener a year's worth of their programs. They
17 may make an occasional change, but those programs for this
18 purpose I'm sure would be adequate for ASCAP's purposes.

19 Stations that program in the popular or folk
20 idiom, we might want to ask for limited amounts of informa-
21 tion, which would be furnished, I think, by the disc jockey
22 making out a list. We will supply the forms. As they
23 played the record they would put down the title and the
24 particular record. It's really not a problem.

25 Might I suggest that if the Tribunal is at all

1 concerned about there possibly being an undue burden on the
2 public broadcasters in this respect, that they might --
3 first, you might consider whether this is the type of pro-
4 vision which can be modified short of a five-year period.
5 I'm not sure. I haven't addressed that question.

6 Alternatively, what you might do is put in alter-
7 native requirements. Now, the first, as the Chairman
8 described it, and the second an alternative which would come
9 into play if, on the application of the public broadcasters
10 on a representation that they were being unduly burdened,
11 if the Tribunal felt that that was so, you might cut back
12 on the requirement. I am so confident that that will not
13 happen that I would be happy to see you write a very minimal
14 type of reporting requirement as the alternative requirement.

15 But I don't think you should get hung up on this
16 question. It is not going to be a burden to anyone.

17 CHAIRMAN BRENNAN: Is there any further discussion?

18 MR. KORMAN: One further thing. It would be a
19 burden, however, Mr. Chairman, is Mr. Aleinikoff's sugges-
20 tion that we get tapes. Tapes are very expensive. There
21 are very few people who can identify music from a tape. We
22 may have a corner on that market, but it's hard to get
23 people who are so "feges" -- that word I think came up
24 here -- people who can listen to music and write down the
25 notes as they listen to it. I doubt that anybody in this

1 room can do that or even have heard of that term before.
2 These are just rare skills.

3 I don't want to get involved with a lot of public
4 broadcasting tapes, spending a lot of money trying to find
5 out what's there. Remember, we're talking about many per-
6 formances here and relatively little money. The numbers
7 that we've been talking about so far are one to two million
8 dollars a year, as against 60 or 70 million that the
9 commercial broadcasters pay.

10 We are not going to have a very expensive survey.
11 We can't afford to have a very expensive survey. That will
12 make our members unhappy. We can't afford to have a very
13 expensive survey to divide up a million dollars, nor would
14 we dream of trying to put the public broadcasters to an
15 expense that's out of line to the million dollars.

16 Might I remind the Tribunal, finally, that we are
17 going to be coming back here. We have to live with this
18 Tribunal, and if the representations that we make are not
19 borne out, we, I think, must expect that the Tribunal will
20 remember that.

21 And the representations that we make to you in
22 other context -- juke boxes, cable television, whatever --
23 are going to be taken with a grain of salt. So, you have
24 every reason, I think, to have considerable confidence in
25 what we tell you, and are at a great risk if we don't follow

1 through.

2 CHAIRMAN BRENNAN: Is there discussion by the
3 Commissioners?

4 (No response.)

5 CHAIRMAN BRENNAN: If not, can we agree upon this
6 in principle?

7 COMMISSIONER JAMES: Right.

8 CHAIRMAN BRENNAN: So agreed.

9 We turn now to the college radio stations, and we
10 have a preliminary legal question. There has been an
11 occasional reference during these proceedings to a standard
12 license agreement between BMI and colleges and universities,
13 and reference also to a master or a standard agreement be-
14 tween SESAC and at least certain colleges and universities.

15 Until recently, we were proceeding on the assump-
16 tion that these agreements would have been filed in the
17 Copyright Office as is provided in Section 118-2.

18 As this Commissioner reads the Copyright Act,
19 performing rights societies, colleges and universities are
20 subject to the rates and terms which this body will adopt
21 unless voluntary license agreements have been filed properly
22 in the Copyright Office.

23 The statute further requires that these agreements
24 be filed within 30 days of execution. There is nothing in
25 this record as to whether certain of those agreements can

40 1 no longer be filed because of the 30-day bar.

2 It seems to me that it clearly was the intent of
3 the Congress that voluntary agreements, when they have been
4 reached in good faith, should be implemented.

5 My understanding of the Copyright Act is such
6 that I believe that we have the authority in our final rule
7 to include a provision stating in substance that when per-
8 forming rights societies, colleges and universities have
9 entered into voluntary license agreements, the rates and
10 terms of those agreements shall prevail in lieu of the rates
11 and terms otherwise provided in our regulations.

12 I believe that we have the authority to include
13 that in our final rule. I also believe that it will
14 eliminate the necessity to file several hundred individual
15 license agreements with the Copyright Office.

16 I'm sorry to deprive the Copyright Office of a
17 little revenue --

18 (General laughter.)

19 CHAIRMAN BRENNAN: But I do not see that that
20 requirement for filing in the office serves any practical
21 purpose.

22 So, I propose to my colleagues that we attempt
23 to give full force and effect to these voluntary agreements
24 by including in our final rule the language which I have
25 previously suggested.

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Is there any discussion on this issue?

(No response.)

CHAIRMAN BRENNAN: If not, it's so resolved.

The next issue concerns the proper relationship among the several performing rights societies -- ASCAP, BMI, and SESAC -- as to the compensation which they would receive under our schedule for uses by colleges and by stations not affiliated with colleges or with National Public Radio.

Regardless of how we resolve the issue in our rate schedule, I believe our final opinion SHOULD (in capital letters) indicate that we are not making a judgment as to the respective values of these repertories, nor are we really at this time in a position to make a judgment as to the use of the repertories of the several societies by Public Broadcasting or NPR.

It seems to me there are several options which are available to us. I will outline these and then perhaps the Commissioners can indicate their disposition.

One option would be to determine approximately the total payment to be made by National Public Radio for performance rights in music, taking into account the ASCAP formula, as established here, plus with regard to BMI and SESAC, the sums provided in the voluntary agreements, and then applying that same ratio to the colleges and unaffiliated stations, namely that we would decide on approximately

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1 the total sum which would be paid by a college station or
2 an unaffiliated station, and then break that down into three
3 parts, with the ratio determined by the same ratio which
4 would apply under the NPR payments.

5 The second option would be to determine the
6 distribution --

7 COMMISSIONER JAMES: Excuse me, Mr. Chairman.

8 CHAIRMAN BRENNAN: Yes.

9 COMMISSIONER JAMES: How do we get the NPR ratio
10 in the SESAC and the BMI Agreements?

11 CHAIRMAN BRENNAN: Well, we would have to make a
12 guess since there is no break down. In fact, there would be
13 no break down, very likely, or there may not be in our
14 formula, as to radio and television. That remains to be
15 determined.

16 So, you might have to group radio and television
17 together in establishing the formula, and then apply that
18 solely to radio performances.

19 COMMISSIONER JAMES: Okay.

20 CHAIRMAN BRENNAN: The second option would be to
21 divide it generally by the ratios which have developed in
22 the voluntary license agreements with colleges for per-
23 formance rights in music.

24 And a third option would be to treat ASCAP and
25 BMI the same. The will receive exactly the same amount,

1 with SESAC receiving a lesser sum appropriate to its
2 repertory and its total collection.

3 And perhaps the last option would be to divide
4 the total payment equally among the three societies.

5 So, I lay these four options out on the table, and
6 I invite my colleagues to make their views known.

7 COMMISSIONER JAMES: Mr. Chairman, I support the
8 last one. Because of the amount of money that we are
9 talking about, we don't want to put a burden on the colleges
10 as far as having to report and make payments, that it's
11 probably easier for everyone concerned to just a rate that
12 is equal between all three societies.

13 You want to get into the method of applying that
14 rate?

15 CHAIRMAN BRENNAN: No, let's decide this first.

16 COMMISSIONER JAMES: Okay.

17 CHAIRMAN BRENNAN: I would have great -- with all
18 due deference to the counsel for SESAC -- I would have
19 difficulty in dividing the total payment into three equal
20 shares, regardless of how small the individual shares might
21 be.

22 I see some logic in giving equal shares to ASCAP
23 and BMI, but I think it would be unjustified to divide the
24 payments into three equal shares.

25 COMMISSIONER JAMES: See, there's going to be a

44 1 dispute as to what proportionate share each is to get. BMI
2 sent us a letter dated, I think, May 16th or 17th, indicating
3 that they have 55 percent.

4 We've heard testimony throughout that ASCAP has
5 60 percent. If you start getting into a procedure where
6 you are going to divide up and place weight on which one has
7 a repertoire that's used more by college stations, it will
8 take us another year.

9 CHAIRMAN BRENNAN: You indicated what you thought
10 the numbers were for ASCAP and BMI; you didn't venture an
11 opinion about the percentage of SESAC.

12 COMMISSIONER JAMES: No.

13 COMMISSIONER BURG: Mr. Chairman, I support the
14 third option of having BMI and ASCAP proportioned equally,
15 and SESAC at a lesser amount. I'm trying to work out an
16 amount.

17 CHAIRMAN BRENNAN: Commissioner Garcia?

18 COMMISSIONER GARCIA: I pass.

19 COMMISSIONER JAMES: Was that a motion?

20 CHAIRMAN BRENNAN: I move that we, for both
21 colleges and the unaffiliated stations, give equal shares to
22 ASCAP and BMI. In terms of the percent, I would give 40
23 percent to ASCAP, 40 percent to BMI, and I'm prepared to go
24 up to 20 percent for SESAC, but I couldn't go beyond that.
25 I think that's even being generous.

1 COMMISSIONER JAMES: Don't look at me. Look at
2 him.

3 (General laughter.)

4 CHAIRMAN BRENNAN: There's a further suggestion
5 that it ought to be 45-45 and 10.

6 MR. CIANCIMINO: That I do not like.

7 (General laughter.)

8 CHAIRMAN BRENNAN: Commissioner, do you want to
9 offer a substitute?

10 COMMISSIONER BURG: Why do I always have to get
11 out in the firing line? All right, I'll offer a substitute
12 of a split of 45-45 and 10.

13 COMMISSIONER COULTER: I will support that.

14 COMMISSIONER JAMES: You say you will?

15 COMMISSIONER COULTER: Yes.

16 COMMISSIONER JAMES: Are we voting on this now?

17 CHAIRMAN BRENNAN: I think we will just have a
18 show of hands. All those who favor this proposal, please
19 indicate.

20 (A show of hands.)

21 CHAIRMAN BRENNAN: Opposed?

22 COMMISSIONER JAMES: I will abstain.

23 CHAIRMAN BRENNAN: Adopted.

24 Now, having decided how we are going to divide
25 this payment, we must determine the amount. We have been

1 proceeding on the assumption of having two schedules -- one
2 for the colleges and another one for the unaffiliated.
3 Let's start with the colleges, and the initial question is
4 whether or not it should be divided according to some
5 standard, perhaps wattage.

6 Is there any discussion on that? Commissioner
7 Coulter.

8 COMMISSIONER COULTER: I would like some very
9 simple definition, but if wattage is to be used I suggest
10 the line I believe drawn by SESAC of 20 watts.

11 CHAIRMAN BRENNAN: You will treat all stations
12 below 20 watts --

13 COMMISSIONER COULTER: The same, and all stations
14 above 20 watts the same.

15 CHAIRMAN BRENNAN: And all stations above 20
16 watts the same. Two steps?

17 COMMISSIONER COULTER: I think the reason for that
18 is that we're dealing with relatively small sums of money,
19 and simplicity is probably to everyone's advantage.

20 CHAIRMAN BRENNAN: Is there any discussion on that
21 suggestion?

22 COMMISSIONER JAMES: Yes. I have a question on
23 that suggestion, then I want to give one of my own.

24 Commissioner Coulter, as I recall, SESAC has 20
25 watts and above, and then they have a population formula

1 after that.

2 COMMISSIONER COULTER: Yes.

3 COMMISSIONER JAMES: Is that what you're suggest-
4 ing?

5 COMMISSIONER COULTER: No. I'm simply suggesting
6 that we adopt their break off of 20 watts.

7 COMMISSIONER JAMES: And go from where?

8 COMMISSIONER COULTER: Below 20 watts and above
9 20 watts.

10 COMMISSIONER JAMES: With no consideration given
11 to population?

12 COMMISSIONER COULTER: Not in this case, no.

13 COMMISSIONER JAMES: Okay.

14 COMMISSIONER COULTER: That's just for ease.

15 COMMISSIONER JAMES: Mr. Chairman, I'd like to
16 amend Commissioner Coulter's motion by recommending that we
17 adopt the American Council on Education and Inter-collegiate
18 Broadcasting System's four-step procedure, where you have
19 a cut off at 11 to 5,000, 5,001 to 20,000, 20,000 watts to
20 50,000 watts, and all those stations over 50,000 watts.

21 CHAIRMAN BRENNAN: The Commissioners have heard
22 the amendment. Is there any debate on the amendment?

23 (No response.)

24 CHAIRMAN BRENNAN: All those in favor of the
25 amendment, please indicate?

(A chorus of "ayes.")

1 CHAIRMAN BRENNAN: Opposed?

2 (A chorus of "nos.")

3 CHAIRMAN BRENNAN: The amendment is defeated.
4 Two "yeas," three "nays."

5 The question occurs on Commissioner Coulter's
6 motion.

7 (No response.)

8 CHAIRMAN BRENNAN: The Chair takes it that a
9 majority of the Commissioners have determined that for both
10 the colleges and the unaffiliated, we will have a two-step
11 schedule with 20 watts being the dividing point.

12 The next issue, obviously, is the amount of the
13 payment. As to colleges, I believe a total payment of
14 approximately \$200 would be consistent with the criteria
15 which we have previously established in this proceeding.

16 Is there any discussion?

17 (No response.)

18 CHAIRMAN BRENNAN: Let's go off the record.

19 (Discussion was held off the record.)

20 COMMISSIONER COULTER: Mr. Chairman, I move that
21 for colleges we not consider the wattage question, and
22 treat them all the same. That will be only one step.

23 CHAIRMAN BRENNAN: A payment of \$200?

24 COMMISSIONER COULTER: A payment of \$200 for
25 colleges.

49 1 COMMISSIONER BURG: And then consider the wattage
2 for unaffiliated?

3 COMMISSIONER COULTER: Unaffiliated, yes.

4 COMMISSIONER BURG: For up to 20 watts, and 20
5 watts and over?

6 COMMISSIONER COULTER: Yes.

7 COMMISSIONER BURG: But not for colleges.

8 COMMISSIONER JAMES: A point of order, Mr.
9 Chairman.

10 CHAIRMAN BRENNAN: A point of order.

11 COMMISSIONER JAMES: I thought we already approved
12 the wattage on the two steps. What are we doing now?

13 COMMISSIONER COULTER: Let's go off the record.

14 COMMISSIONER JAMES: No, get it on the record.

15 CHAIRMAN BRENNAN: In the opinion of the Chair,
16 the point of order is well taken. A motion to reconsider
17 the previous decision would be in order if the motion is
18 offered by somebody who is on the prevailing side on the
19 previous question.

20 COMMISSIONER JAMES: What are you now doing?

21 COMMISSIONER COULTER: What I'm doing is in the
22 initial vote we made a distinction between below 20 watts
23 for both colleges and unaffiliated stations. In my current
24 proposal I'm suggesting that we not observe that distinction
25 for colleges, but that we continue to observe it for other

1 affiliated stations.

2 COMMISSIONER JAMES: Another point of order. The
3 original vote was just for colleges, right?

4 CHAIRMAN BRENNAN: No. The original vote was to
5 two steps for both colleges and unaffiliated stations.

6 COMMISSIONER JAMES: All right. Now you are
7 amending --

8 COMMISSIONER COULTER: I would like to amend that
9 so that there be no distinction for colleges according to
10 wattage, but there be a distinction for unaffiliated stations.

11 COMMISSIONER JAMES: How do we get rid of the
12 other vote?

13 CHAIRMAN BRENNAN: Will somebody --

14 COMMISSIONER COULTER: I move simply to amend the--
15 I move to reconsider the previous vote.

16 CHAIRMAN BRENNAN: A question is on a motion to
17 reconsider. All those in favor will say Aye.

18 (A chorus of Ayes.)

19 CHAIRMAN BRENNAN: Opposed?

20 (No verbal response.)

21 CHAIRMAN BRENNAN: The motion to reconsider is
22 is adopted and Commissioner Coulter has the floor.

23 COMMISSIONER COULTER: I move that all colleges be
24 considered at the same category and that the dividing line
25 of 20 watts apply only to unaffiliated stations and that all

1 colleges and unaffiliated stations below 20 watts pay \$200.

2 CHAIRMAN BRENNAN: Is there debate on the motion
3 of Commissioner Coulter?

4 (No verbal response.)

5 CHAIRMAN BRENNAN: Commissioners have heard the
6 motion. We should have a recorded vote on this issue.
7 Commissioner Coulter?

8 COMMISSIONER COULTER: Aye.

9 CHAIRMAN BRENNAN: Commissioner Burg?

10 COMMISSIONER BURG: Aye.

11 CHAIRMAN BRENNAN: Commissioner James?

12 COMMISSIONER JAMES: No.

13 CHAIRMAN BRENNAN: Commissioner Garcia?

14 COMMISSIONER GARCIA: Aye.

15 CHAIRMAN BRENNAN: The Chairman votes aye. On
16 this vote the "ayes" are four, the "nays" one. Commissioner
17 Coulter's motion is adopted.

18 The next issue is the periodic inflation adjustment.

19 Commissioner?

20 COMMISSIONER GARCIA: If I understand correctly,
21 we have just adopted the step for colleges, right?

22 CHAIRMAN BRENNAN: No. Commissioner Coulter --

23 COMMISSIONER GARCIA: For those under 20, but
24 what about those over 20, for non-affiliated over 20.

25 COMMISSIONER JAMES: We need a vote on the rates

1 for colleges.

2 (A short recess was held.)

3 CHAIRMAN BRENNAN: We will resume.

4 Commissioner Coulter?

5 COMMISSIONER COULTER: Continuing with what we were
6 speaking of before, I move that the unaffiliated stations
7 above 20 watts pay twice the rate below; in other words,
8 \$400.

9 CHAIRMAN BRENNAN: Any discussion on the motion?

10 (No verbal response.)

11 CHAIRMAN BRENNAN: All those in favor please
12 indicate.

13 (A chorus of Ayes.)

14 CHAIRMAN BRENNAN: The motion is adopted.

15 COMMISSIONER JAMES: No. Record my vote as no.

16 CHAIRMAN BRENNAN: Let the record indicate
17 Commissioner James voted nay.

18 We go on to the question of inflation. At the
19 last meeting on May 4, we generally agreed that it would be
20 desirable to have one or more cost of living adjustments
21 based on the consumer price index and applying to those
22 royalty rates expressed in fixed dollar sums. The open
23 issue was Commissioner James' suggestion that it might be
24 desirable to have a yearly inflation adjustment.

25 Commissioner, do you wish to pursue?

1 COMMISSIONER JAMES: No. I still stand on that
2 position. No further amplification is necessary. I so move.

3 CHAIRMAN BRENNAN: The proposal of Commissioner
4 James is that there be a yearly adjustment presumably
5 following the same language in the same format of the royalty
6 rates which are expressed in dollar amounts. Is there any
7 debate on the motion?

8 (No verbal response.)

9 CHAIRMAN BRENNAN: If not, we shall proceed to a
10 vote. Does anybody desire a recorded vote?

11 (No verbal response.)

12 CHAIRMAN BRENNAN: If not, all those in favor of
13 the motion of Commissioner James please indicate.

14 COMMISSIONER JAMES: Aye.

15 CHAIRMAN BRENNAN: Those opposed?

16 COMMISSIONER BURG: No.

17 COMMISSIONER COULTER: No.

18 COMMISSIONER JAMES: You'd better get a recorded
19 vote.

20 CHAIRMAN BRENNAN: There is a request for a
21 recorded vote. Commissioner Coulter?

22 COMMISSIONER COULTER: Aye. I abstain.

23 CHAIRMAN BRENNAN: Commissioner Coulter is not
24 voting.

25 Commissioner Burg?

1 COMMISSIONER BURG: We are voting on the amendment?

2 CHAIRMAN BRENNAN: We are voting on the motion of
3 Commissioner James that there be --

4 COMMISSIONER BURG: The vote is no. I vote no.

5 CHAIRMAN BRENNAN: Commissioner Burg votes no.
6 Commissioner James?

7 COMMISSIONER JAMES: Yes.

8 CHAIRMAN BRENNAN: Commissioner Garcia?

9 COMMISSIONER GARCIA: No.

10 CHAIRMAN BRENNAN: The Chairman votes no on this
11 vote. Ayes are one, nays are three, one not voting.

12 I take it then that we agree to have an inflation
13 adjustment and I propose that there be only one adjustment
14 during the five year period. With Commissioner James' point
15 of view being noted, I take it we agree in principle to that
16 proposal.

17 At the last meeting, I indicated that I thought
18 it would be desirable for this body in 1980 to participate
19 in some review of Section 118 which is already mandated by
20 the statute. The Copyright Office is directed to submit a
21 report to the Congress concerning the operation of voluntary
22 agreements concerning uses of certain copyrighted works not
23 within the scope of the compulsory license.

24 I believe that it would be desirable at the same
25 time for this body to make its views known to the Congress

1 concerning our experience with Section 118. I suspect that
2 not all of my colleagues share my general opposition to
3 compulsory licenses and I do not at this stage wish to pre-
4 judge that issue.

5 Consequently, the proposal I make reads as follows:
6 on January 3, 1980, the Copyright Royalty Tribunal after
7 conducting such proceedings as it may deem appropriate
8 shall transmit a report to the United States Congress making
9 such recommendations concerning 17 USC 118 that it finds to
10 be in the public interest.

11 I wish to emphasize that while I have indicated
12 my personal views and my hopes that the adoption of this
13 motion in no way prejudices any disposition towards the
14 position of this body on Section 118, its total repeal,
15 modification, or being left totally unchanged. But, I do
16 recommend that we participate in the 1980 review proceedings.

17 Is there any debate or discussion on this motion?

18 COMMISSIONER JAMES: Question, Mr. Chairman.

19 CHAIRMAN BRENNAN: Commissioner James.

20 COMMISSIONER JAMES: Under our mandate for the
21 Congress and the APA Act, isn't it true that we can do this
22 without this resolution in 1980?

23 In other words, what I'm trying to get at is why
24 does it have to be taken up at this particular point in
25 time and incorporated in this record?

1 CHAIRMAN BRENNAN: I think it is desirable,
2 Commissioner, primarily because of the language to which I
3 made reference in the statute which makes provision for a
4 report in 1980. I agree with you that --

5 COMMISSIONER JAMES: It could be done at any time?

6 CHAIRMAN BRENNAN: -- it could be done later, but
7 I think it is desirable for us as part of the entire package
8 on this proceeding to take this action.

9 Is there further discussion on the motion?

10 (No verbal response.)

11 CHAIRMAN BRENNAN: Is there a request for a recorded
12 vote?

13 COMMISSIONER JAMES: Yes.

14 CHAIRMAN BRENNAN: We shall now proceed to a vote.
15 Commissioner Coulter?

16 COMMISSIONER COULTER: Yes.

17 CHAIRMAN BRENNAN: Commissioner Burg?

18 COMMISSIONER BURG: Yes.

19 CHAIRMAN BRENNAN: Commissioner James?

20 COMMISSIONER JAMES: Yes.

21 CHAIRMAN BRENNAN: Commissioner Garcia?

22 COMMISSIONER GARCIA: Yes.

23 CHAIRMAN BRENNAN: The Chairman votes aye.

24 There are five "ayes", no "nays". The motion is
25 adopted.

1 Commissioner Garcia?

2 COMMISSIONER GARCIA: Yes. Mr. Chairman, since
3 the majority of the Commissioners have agreed in principle
4 to a revenue formula, at this time, I would like to request
5 that the parties both ASCAP and Public Broadcasting assist
6 us in drafting the language as to their views of the formula
7 method. And most importantly the issues I would like for
8 them to specifically address themselves to is the definition
9 of a transmitted entity and the payment date.

10 Therefore, I withdraw my previous motion to meet
11 with these parties and just let them draft it independently
12 on their own and submit it to the Tribunal by Friday so
13 that we may have time to digest it by Monday.

14 CHAIRMAN BRENNAN: The parties have heard the
15 request of Commissioner Garcia. The Chairman certainly
16 supports the Commissioner's request and I would hope that
17 it would be possible for the parties to submit the comments
18 requested by the Commissioner.

19 Are there any other matters to come before the
20 meeting?

21 MR. CIANCIMINO: I don't know if it is proper at this
22 time, Mr. Chairman, but I would ask for some clarification
23 on your prior ruling which to my way of understanding would
24 waive the 30-day filing requirement for college stations.
25 I would ask if this ruling might also apply to unaffiliated

1 stations with whom the performing rights organizations have
2 made voluntary independent licensing arrangements.

3 CHAIRMAN BRENNAN: The basic answer to your question
4 is, yes, that it would obviously be our intent to give full
5 force and effect to such voluntary agreements whether they
6 are with the colleges or with unaffiliated stations. I
7 would have to quibble a little bit with your description of
8 this as a ruling.

9 The statute requires that these license agreements
10 be filed with the Copyright Office if they are to supersede
11 our rates and terms.

12 What this body is doing, in our rulemaking, is
13 trying to give force to those agreements where there may
14 otherwise be a legal obstacle to the implementation of those
15 agreements. Consequently, we would provide whether it is
16 the colleges or the unaffiliated that if there have been
17 such agreements the terms of those agreements apply rather
18 than whatever rates we may adopt. But, that would apply to
19 unaffiliated as well as to colleges.

20 MR. CIANCIMINO: If I may, so far as the filing
21 requirements at the present time with regard to SESAC in
22 some instances amount to 50 percent of the fee, am I
23 correct in my interpretation of what the Chairman just said
24 in that you will give full credit to these agreements absent
25 any filing with the copyright owners?

1 CHAIRMAN BRENNAN: We will include in our final
2 rule, which will be published in the Federal Register as
3 required by the statute, a provision stating that with regard
4 to both colleges and unaffiliated stations where there have
5 been voluntary agreements reached in the past or where such
6 agreements may be consummated in the future, the terms of
7 those agreements shall apply rather than the rates and terms
8 otherwise established in this schedule.

9 Lacking that, I think we are confronted with the
10 situation where you would have this body adopting rates
11 which would be at least theoretically imposed on parties
12 contrary to the wishes of one or both of the parties. But,
13 we have no desire to interfere with any voluntary agreements
14 and if SESAC or ASCAP or BMI or anybody on the college side
15 sees problems with this disposition let us know by the end
16 of the week and we will try to address those concerns.

17 MR. CIANCIMINO: Thank you, Mr. Chairman.

18 CHAIRMAN BRENNAN: If there is nothing further,
19 we shall recess until 10:00 a.m on the fifth.

20 (Whereupon at 4:10 p.m. proceedings were
21 closed.)
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